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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 36.

ALLEGHANY CORPORATION, *et al.*,

Appellants,

v.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

No. 114.

INTERSTATE COMMERCE COMMISSION,

Appellant,

v.

BRESWICK & CO., *et al.*,

Appellees.

BRIEF FOR APPELLEES.

NATURE OF THE CASE.

This case concerns the validity of orders of the Interstate Commerce Commission assuming jurisdiction over an investment company, appellant Alleghany Corporation, and permitting it to issue new preferred stock which the Securities and Exchange Commission has held to be "not necessary or appropriate in the public interest or consistent with the protection of investors', and "grossly unfair" to the common stockholders. *In the Matter of Alleghany Corporation,* Investment Company Act Release No. 2446 (November 30, 1956), —— S. E. C. ——.

Prior Proceedings.

On September 20, 1954, Alleghany and New York Central filed an application with the I. C. C. under Section 5(2)(a)(i) of the Interstate Commerce Act for the alleged purpose of seeking I. C. C. approval of a merger between a Central subsidiary (the Cleveland, Cincinnati, Chicago and St. Paul Railway Co., colloquially known as the "Big Four") and the Big Four's wholly-owned and wholly-controlled subsidiary, the Louisville & Jeffersonville Bridge Company (R. 210).

Alleghany joined in the merger application on the allegation that it controlled Central, thus being "a necessary party" to the proceeding (R. 211), and accordingly, was entitled to an order by the I. C. C. declaring that it be "considered as a carrier" under Sec. 5(3) of the Interstate Commerce Act. Sec. 3(c)(9) of the Investment Company Act excludes from the jurisdiction of the S. E. C. under that Act a company "subject to regulation under the Interstate Commerce Act". Alleghany, however, refrained from applying to the I. C. C. for authority to control Central, contending that the Commission's approval of such control was not necessary (R. 249-250, 427-428). Division 4 of the I. C. C. by order dated March 2, 1955 (R. 446-448) affirmed by the full I. C. C. on May 24, 1955 (R. 516-517), granted the application over objection of the appellees. (These orders are sometimes hereinafter referred to as the "status" or "jurisdiction-assuming orders".)

Upon the assumption that the status application would be granted, Alleghany on February 18, 1955, applied to the I. C. C. for an order under Sec. 20a of the Interstate Commerce Act authorizing an issue of new 6% preferred stock

to make possible an Exchange Offer to the holders of its outstanding Series A 5½% preferred stock (R. 371-392). This order, over objection of appellees, was made by Division 4 on May 26, 1955 (R. 536-537), affirmed, also over appellee's objections, by the full Commission by order dated June 22, 1955 (R. 554), and issued on June 23, 1955 (R. 96, 135).

On June 6, 1955, appellees filed their complaint in the District Court for the Southern District of New York seeking to annul and to enjoin the status order (R. 32). On June 15, 1955, appellees moved the statutory court for a preliminary injunction against the enforcement of the order (R. 53). While said motion was *sub judice* Alleghany, in the early afternoon of June 23rd, without prior notice to appellees or to the court, started to issue the new stock. Upon learning this, the District Court at 5:55 P. M. that day issued upon application of the appellees, a temporary restraining order enjoining the transfer or issuance of the new stock (R. 56-58). This order was issued only after 876,800 shares of the new stock out of a total of 1,323,400 had been delivered to the original holders of deposit receipts for the old stock (R. 111).

On June 24th, a motion by Alleghany to vacate the restraining order was denied by the court, and a similar motion by the preferred stockholders was denied on June 28, 1955 (Unprinted R. 923, *et seq.*).

A supplemental complaint bringing up the preferred stock orders of May 26, 1955 and June 22, 1955 for review in the same action was filed on July 13, 1955 (R. 101).

By opinion dated July 21, 1955 (R. 601-628) the District Court granted appellees' motion for a preliminary injunction and the order thereon issued on July 26, 1955 (R. 103-108). On August 1, 1955, and after the District Court denied appellants' application for a stay of the pre-

liminary injunction pending appeal (R. 109), Alleghany applied to Mr. Justice Harlan for similar relief. By opinion dated August 3, 1955 (R. 643, 75 Sup. Ct. 912), and order entered on August 9, 1955 (R. 110-112), Mr. Justice Harlan granted the application as to the 876,800 distributed shares and denied it as to the 446,600 undistributed shares and in all other respects. The 876,800 distributed shares are still in the hands of the original holders (Statement as to Jurisdiction, pp. 28-29).

On November 18, 1955 the District Court filed its opinion granting plaintiffs a permanent injunction (R. 651-673) and judgment thereon was entered on December 23, 1955 (R. 555-557).

The present appeals from the final judgment are taken in No. 36 by Alleghany, Gruss & Co., a brokerage firm owning preferred stock, and Neuwirth, a common stockholder. The brokerage firms of Baker Weeks & Co. and Oscar Gruss & Son, and other individual preferred stockholders are the appellants in No. 82. The I. C. C. is the sole appellant in No. 114.[1]

Questions Presented by the Appeals.

1. Is there any merit to Alleghany's contention that appellees as common stockholders, suing in their own right and representatively, suffered no reviewable injury by the I. C. C.'s orders approving Alleghany's acts in "seeking

[1] The United States and New York Central, defendants below, have not appealed. The United States, reversing its position below, has filed a brief supporting appellees' contentions that they have standing to sue and that the I. C. C. had no jurisdiction over Alleghany. On January 11, 1957, the Clerk advised appellees that the time of appellants in No. 82 to file a brief was extended to January 15, 1957 with leave to appellees to answer within 30 days. This brief is addressed only to Nos. 36 and 114, and is filed now since oral argument is to be held on or about January 23, 1957.

refuge with the I. C. C." so that it might issue $48,000,000 of new preferred stock prohibited by the S. E. C. under the Investment Company Act and found by the S. E. C. to be not "appropriate in the public interest" and "grossly unfair" to the common stockholders?

2. Where two individuals, in control of a publicly-owned investment company, purchase in association with two other individuals for their personal account 1,000,000 shares of stock of New York Central Railroad Company worth $23,500,000 while limiting the investment company's purchase to 11,400 shares worth $270,000, can the I. C. C. properly find that the investment company and not the individuals had acquired control of the carrier?

3. After a proxy contest for the control of New York Central had been concluded with the election of the four individuals owning 1,000,000 shares and their eleven nominees, could the I. C. C. properly find upon these facts, and upon a claim of subsequent purchase by the investment company of 600,000 shares of the carrier, that, as a matter of law: (1) the investment company and not the four individuals had acquired control of the carrier; and (2) no application for acquisition of such control was required to be made to the I. C. C., such non-approved control being sufficient to give the I. C. C. jurisdiction over the investment company so as to permit its controlling persons to avoid regulation by the S. E. C. under the Investment Company Act?

4. When Section 5(2) of the Interstate Commerce Act requires that a non-carrier acquiring control of "two or more carriers" must apply to the I. C. C. for approval of such acquisition, may a non-carrier which refuses to file

such an application for control of a railroad system of 73 affiliated carriers, avoid subjecting the lawfulness of such acquisition to I. C. C. scrutiny and then obtain I. C. C. jurisdiction over itself as a non-carrier simply by joining itself as a party to an application to approve an intra-corporate "merger" and lease "modification" by one subsidiary of its already 100%-owned and controlled subsidiary?

5. May an investment company, after it has divested itself of control of all its carriers, properly continue to act under the jurisdiction of the I. C. C. for 17 months after such divestment and thereby escape regulation by the S. E. C. under the Investment Company Act until the I.C.C. finds that the investment company, subsequent to such divestment, has acquired control of a new system of carriers, and, by virtue of such new control, gain retroactive exemption from its obligations under the Investment Company Act?

6. Where the management of a non-carrier allegedly subject to I. C. C. jurisdiction obtains the approval by the I. C. C. of a recapitalization plan, under which new preferred stock with common stock conversion rights then valued in the market at $48,000,000 are to be given in exchange for old preferred stock with a maximum legal claim of $33,000,000 (20% of which was bought up in advance by the company's Chairman and President) did the protesting common stockholders of the non-carrier, who were admitted to intervention only after the case had been decided, receive a fair hearing?

7. Where the individuals controlling a non-registered investment company disrupt the *status quo* while a motion

for a preliminary injunction is *sub judice* and in order to realize illegal personal profits totalling $4,862,000 by proceeding to issue securities in violation of the Investment Company Act pursuant to void orders of the I. C. C. authorizing such issuance, was it proper for the District Court to enjoin the distribution of the securities and to take all steps necessary to preserve the *status quo*, thereby preventing the unauthorized securities from passing into the hands of innocent persons?

8. Are the preferred stockholders of Alleghany "innocent" purchasers in view of the following facts: (1) they took the new stock in exchange for old securities of Alleghany pursuant to a *voluntary* Exchange Offer contract providing that I. C. C. approval of the new securities was a pre-condition of their validity; (2) reasonable inquiry would have disclosed that the jurisdiction of the I. C. C. over Alleghany had for 4 months been under an attack which, if successful, would negate the I. C. C.'s power to approve the new securities; (3) such information was publicly available in time to permit the withdrawal of their old securities from the Plan; and (4) the holders, nevertheless, allowed their securities to become "frozen" on the wager that the attack on the I. C. C. jurisdiction would be unsuccessful?

STATEMENT[1a]

The S. E. C.'s Refusal to Exempt the New Stock.

Following the issuance of the District Court's opinion granting final judgment for plaintiffs on November 18, 1955 (R. 651-673), Alleghany on December 9, 1955 registered with the S. E. C. under the Investment Company

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[1a] For the convenience of the Court we have set out in Appendix A a chronological statement of the events which appellees consider pertinent to the issues of this case.

Act. In February, 1956, along with certain preferred stockholders, it applied for an order exempting the new preferred stock from the prohibitions of that Act. After a full hearing the S. E. C. issued an order refusing the exemption and finding the plan to be improper and unfair. (See pp. 107-110, this brief.)

The Asserted Basis for I. C. C. Jurisdiction.

The I. C. C. orders assuming jurisdiction over Alleghany and authorizing the issuance of the new preferred stock were made upon the premise that Alleghany had acquired control of the New York Central Railroad System of 73 carriers, and that by reason of a proposed merger of one subsidiary of Central with a wholly-owned subsidiary, was entitled to an order under §5(3) of the Interstate Commerce Act declaring that Alleghany is to be "considered as a carrier". It would thus escape the jurisdiction of the S. E. C. by reason of §3(c)(9) of the Investment Company Act, which excludes from the operation of that Act a company "subject to regulation under the Interstate Commerce Act".

The Grounds of the District Court Decision.

The District Court enjoined and annulled the I. C. C. order under §5(3), and also its order under §20a of the Act authorizing Alleghany in its new status as a "carrier" to issue the proposed preferred stock. The grounds of the court's decision were:

1. The I. C. C.'s findings as to Alleghany control of Central were insufficient and the evidence did not support them.

2. Investing Alleghany with carrier status under §5(3) required an application by Alleghany to control Central and a finding by the I. C. C. that such control was "in the public interest", whereas Alleghany made no such application and was refusing to make one.

3. The intra-corporate "merger" and lease "modification" by two Central subsidiaries were not transactions within §5(2) of the nature required to invest Alleghany with carrier status under §5(3).

4. The effect of Alleghany's attempt to invest itself with carrier status would be to remove it from regulation by the S. E. C. and the more rigid requirements of the Investment Company Act and would deny to plaintiffs, as common stockholders of Alleghany adversely affected by the proposed new securities, the benefits and protection of that Act.

5. The I. C. C. had not lawfully acquired jurisdiction over Alleghany, such jurisdiction as it had having been lost when Alleghany divested itself of control of the Chesapeake & Ohio Railroad System on January 19, 1954, some 17 months before the I. C. C. made the final jurisdiction-assuming order under review.

6. Plaintiffs were not given a fair and full hearing and were thus denied due process of law by the I. C. C.

7. Alleghany having disrupted the *status quo* by attempting to issue the new preferred stock while plaintiffs' motion to enjoin the jurisdiction-assuming order was *sub judice,* it was necessary to issue an injunction to prevent the securities from reaching innocent third parties and creating rights beyond the power of the court to recall.

8. Appellees had standing to review the I. C. C. orders because, as common stockholders, they were "threatened with serious harm" since the right to convert the new preferred stock into common stock

might dilute their stockholdings, and the effect of the jurisdiction-assuming order would be to deny appellees the benefits and protection of the Investment Company Act guaranteed to them as stockholders of an investment company, including a statutory prohibition against the issuance of the proposed new preferred stock.

Appellees contend that the District Court correctly decided the case in all respects and that its final judgment should be affirmed.

Alleghany's 1945 Application to Control the C. & O. System.

On November 1, 1940, Alleghany Corporation registered with the S. E. C. under the Investment Company Act. In 1944 the I. C. C. instituted an investigation to determine whether Alleghany and its Chairman and President, Robert R. Young and Allan P. Kirby, respectively, had illegally acquired control of the Chesapeake & Ohio Railway System which included, among others, the Nickel Plate and Pere Marquette Railroads (*Chesapeake & Ohio Railway Co. Purchase*, 261 I. C. C. 239). In settlement of that litigation, Young, Kirby and Alleghany applied for an I. C. C. order which found that Alleghany had acquired legal control of the C & O System and directed that Alleghany be considered as a carrier under jurisdiction of the I. C. C., pursuant to §5(3) of the Act (*Id.* pp. 240-241). Thereafter, on October 4, 1945, Alleghany procured an order from the S. E. C. terminating its jurisdiction under the Investment Company Act. *In the Matter of Alleghany Corporation*, 20 S. E. C. 731.

Alleghany's 1954 Divestment of C. & O. Control.

On January 19, 1954, Young and Kirby caused Alleghany to divest itself of control of the C & O, and as a result, Alleghany ceased to control any railroad carrier, thereby automatically terminating the jurisdiction of the I. C. C. over it under the Interstate Commerce Act.

The I. C. C. instituted a proceeding early in 1954 to determine whether to void its 1945 order directing that Alleghany be considered as a carrier based on its control of the C & O, and the S. E. C. likewise instituted a proceeding to determine whether in view of the divestment of that control, Alleghany should not be required to register under the Investment Company Act.

Alleghany's Dilatory Tactics Before the S. E. C. and the I. C. C.

Young and Kirby, being desirous of using the funds of Alleghany to aid them in their personal attempt to obtain control of New York Central, refused to cause Alleghany to register under the Investment Company Act which (as the S. E. C. informed the I. C. C.) explicitly prohibits such use of an investment company's resources (198, 405).

By a series of requests to the I. C. C. and the S. E. C. Young and Kirby caused Alleghany to postpone taking any steps to clear up its status before both agencies (R. 192-193, 422-423). Alleghany now claims that the District Court has introduced "chaotic uncertainty and confusion into administrative regulation" (br., pp. 22, 38-52), but it ignores the fact that these delays in clearing up its status were made at its own request and were extended over a period of some seven months.

The Reason for Alleghany's Belated I. C. C. Application.

On September 20, 1954 Young and Kirby finally caused New York Central to file an application with the I. C. C. under §5(2)(a)(i) of the Interstate Commerce Act for the ostensible purpose of seeking I. C. C. approval of a merger between a Central subsidiary (the Cleveland, Cincinnati, Chicago and St. Louis Railway Co., colloquially known as the "Big Four") and the Big Four's wholly-owned and wholly-controlled subsidiary, the Louisville & Jeffersonville Bridge Company (R. 210). The real purpose, as is demonstrated below, was to secure for Alleghany a fictional legal basis for its claim that it was entitled to be considered as a carrier under §5(3) of the Act, and therefore to be regulated by the I. C. C.

Alleghany joined in the merger application on the theory that as the allegedly controlling parent of Central it was "a necessary party" to the proceeding (R. 211). However, although all parties agree that Alleghany's right to carrier status directly depends on the reality of its alleged control of New York Central, and although Alleghany claimed to be in control of Central at the time it asked for carrier status, it carefully refrained from applying to the I. C. C. for authority to control Central, contending that the Commission's approval of such control was not necessary (R. 249-250, 427-428). When the Commission suggested that a proper interpretation of the Act required that Alleghany make a formal application for Commission approval of its acquisition of control of Central, Alleghany refused so to do (*Id.*), a position which it has continued to maintain to this very day.

The S. E. C.'s Petition Asking I. C. C. to Decline Jurisdiction.

While the Alleghany application for carrier status was pending before the I. C. C., the S. E. C. intervened and petitioned the I. C. C. to decline jurisdiction over Alleghany, pointing out (1) that Alleghany had been an investment company prior to the 1945 I. C. C. order declaring it to be a carrier by reason of its control of the C & O System of carriers; (2) that Alleghany had divested itself of the C & O System on January 19, 1954; (3) that assuming the applicability of the Investment Company Act to Alleghany, many interim acts and transactions of Alleghany had violated the Act; (4) that the business of Alleghany was, in fact, essentially and principally that of an investment company owning non-carrier investments; and (5) that the S. E. C. was prepared to assume regulatory jurisdiction over Alleghany whose activities more appropriately required S. E. C. rather than I. C. C. supervision (R. 190-210).

The Reasons for Young and Kirby's Preference for I. C. C. Jurisdiction.

Young and Kirby had personal reasons for investing the I. C. C. with jurisdiction over Alleghany when in fact and law it was then subject to the mandatory jurisdiction of the S. E. C. under the Investment Company Act. They could thus avoid S. E. C. scrutiny and the statutory prohibition of their personal use of Alleghany's funds in the Central proxy contest (R. 198, 200) and of their proposed plan for exchanging Alleghany's *non-convertible* Series "A" 5½% Preferred Stock for a new issue of 6% *convertible* preferred stock (R. 203-204). Prior to offering this plan to

the stockholders, Young, his wife, and Kirby had acquired some 20% of the old preferred stock issue for their personal accounts (R. 522). In addition, by April 8, 1954 Young, Kirby, Clint W. Murchison and Sid W. Richardson had acquired 1,000,000 shares of New York Central common stock for their personal accounts while limiting Alleghany's investment therein to but 11,400 shares (R. 394-395, 406-407). Thereafter and on May 26, 1954, as a result of a proxy contest, Young, Kirby, Murchison and Richardson were successful in electing themselves and 11 associated nominees as directors of New York Central (*Id.*). By that date they had personally borrowed $8,578,000 of Alleghany's funds to make possible this personal contest (R. 408, 198).

The Inconsistent Claim that the Young Group's Personal 1,000,000 Share Holdings of Central Conferred Control on Alleghany but that the Profits Belonged to the Individuals.

While alleging that all the profits on the 1,000,000 shares were theirs personally (See *Breswick* v. *Briggs,* S. D. N. Y. 1955, 135 F. Supp. 397, at pp. 401-2), Young and Kirby nevertheless alleged before the I. C. C. that in winning control of Central they had acted on behalf of Alleghany, the purpose of this contradictory argument being to induce the I. C. C. to find that it was Alleghany and not Young and Kirby who controlled Central and, by reason of such control, to grant Alleghany carrier status under the Interstate Commerce Act. At the same time, by keeping the old 1945 I. C. C. order still formally in existence, they hoped to maintain a defense to their use of Alleghany's resources for their personal benefit on the ground that this was not prohibited by the Interstate Commerce Act, although it is by the Investment Company Act (R. 198).

Young and Alleghany's disruption of the status quo while the motion for preliminary injunction was sub judice.

Mr. Young's tactics were crowned with success when the I. C. C. issued the jurisdiction-assuming and the preferred stock plan orders, although the full I. C. C. refused to find as Alleghany now requests this Court to do, that the 1945 I. C. C. order continued in effect for the next 17 months after January 19, 1954 until formally terminated.

When plaintiffs herein sought to object to the I. C. C. assuming jurisdiction over Alleghany and approving issuance of the new preferred stock, they were denied a hearing and their objections were summarily overruled. Thereafter they instituted on June 6, 1955 this three-judge court action (R. 32), and while their motion made on June 15, 1955 for preliminary injunction against the jurisdiction-assuming order was *sub judice* (R. 53), Young and Kirby caused Alleghany on June 23, 1955 to start issuing the new preferred stock. By this act they hoped to confront the court with the introduction into the stream of commerce of $48,000,000 of unrecallable securities as a *fait accompli*, and thus to make it impossible effectively to give any relief to the appellees and to the Alleghany common stockholders as a class (R. 57, 613, 640-641).

The I. C. C.'s conduct assisted Alleghany's effort to moot the court's jurisdiction.

The order to show cause why the motion for preliminary injunction should not be granted was returnable on June 23, 1955. By stipulation of the attorneys for the U. S., the I. C. C. and the plaintiffs, orally made in open court on June 21, 1955, the motion was adjourned to June 30, 1955

with the approval of the court per Dimock, D. J. (R. 95-96). At no time did the I. C. C. reveal to the Court that on the very next day following its appearance in support of the government's requested stipulation for adjournment, it would issue a final order approving issuance of the Preferred Stock and denying the request of appellees for a stay of such an order until they could make application to the three-judge court for a restraining order. The record also shows that the final order of June 22 of the I. C. C. was not publicly filed by the I. C. C. until June 23 and that service and notification of its issuance was made on plaintiffs by mail dated June 23, 1955, and received in New York on June 25, 1955. The foregoing facts were alleged in paragraphs 6 and 7 of plaintiffs' supplemental complaint (R. 95-6) and were admitted in the answers of both the United States and the I. C. C. (R. 121, 135).

The attempted issuance of 48 million dollars of new stock to satisfy a maximum legal claim of 33 million dollars.

Had not the District Court frustrated this maneuver by its restraining order and injunctions, Young and Kirby and the other preferred stockholders would have received securities with a then current market value of $15,000,000 in *excess* of 100% of their maximum claims as holders of the old preferred stock, and the preferred stock could then have passed into the hands of innocent third parties.

The preferred stock plan was submitted to the Alleghany common stockholders in the form of a proposed Exchange Offer which purported to explain its details, substance and effect (R. 282-311). Omitted therefrom was the crucial fact that the conversion formula in the Exchange Offer could work so as to give the old preferred stockholders, at the

expense of the common, the aforesaid $15,000,000 premium *over* 100% of their maximum legal claims as preferred stockholders, and had been deliberately contrived to make such a result possible (See pp. 106-109, this brief). Also omitted was any mention of the challenge to the I. C. C. jurisdiction over Alleghany which was at that very time being made by the S. E. C. and the appellees (R. 191-210, 251-260).

The Preferred Stockholder Appellants are not "innocent" purchasers.

The Exchange Offer provided that the new securities could not be issued until a final I. C. C. order of approval had been obtained (R. 334). Reasonable inquiry by any preferred stockholder would have disclosed the pendency of the I. C. C. proceeding, the objections which appellees and the S. E. C. made therein to the jurisdiction of I. C. C. over Alleghany, to the I. C. C.'s power to approve the new securities, to the fairness of the plan, and to its propriety in the public interest (R. 191-210, 251-260, 317, 392, 448, 478, 489, 537).

Any preferred stockholder who desired to accept the Exchange Offer was required to fill out a letter of transmittal which referred to and constituted an acceptance of the Exchange Offer and which contractually integrated him into the Plan (R. 334-335). By reason thereof the right of the preferred stockholders to the new securities became subject to Alleghany obtaining an appropriate (valid) order of approval from the I. C. C. (R. 334). None of the preferred stockholders, including those before the Court on this appeal, claims lack of notice of that fact.

The "innocent" purchaser position of the preferred stockholders is untenable. Having voluntarily deposited their old stock in acceptance of the Plan with knowledge of

appellees' challenge to the I. C. C. jurisdiction, and having knowingly wagered against the success of that challenge, and having lost the wager, they now ask this Court to relieve them from injury caused by their own imprudence.

Appellees' Timely Notification to the Appellants.

Appellees made every possible effort to alert the investing public to the dangers inherent in the new issue of preferred stock. Two months before the new preferred stock was put out by Alleghany in disruption of the *status quo* and before the three-judge court action was commenced, appellee's counsel notified the New York Stock Exchange of the pendency of the proceedings before the I. C. C. and of a derivative stockholders action brought in the District Court to restrain the issuance of the new securities (R. 88); see *Breswick & Co.* v. *Briggs*, 130 F. Supp. 953. The New York Stock Exchange was advised that the validity of the new preferred stock would be attacked and it was informed of the ground upon which the attack would be made (R. 88). The Exchange was also advised that a serious misstatement had been made in the listing application in which Alleghany counsel had advised that no material litigation was pending (R. 88).[2] The Exchange Offer (R. 331-367) failed to make any reference to the fact that in the then pending proceedings before the I. C. C., its jurisdiction

[2] The listing application referred to (R. 88, 382) is not in the record but is a public record at the New York Stock Exchange and was marked in evidence in Alleghany's S. E. C. proceeding to obtain an exemption from the Investment Company Act. Under the heading "Litigation" it contains the following representation:

> "The corporation (Alleghany) is not involved in any pending litigation of a material nature which may affect its income from, the title to, or possession of, any of its properties, with the exception of its interest as an intervenor in the litigation with respect to the reorganization of the Missouri Pacific Railroad Company."

over Alleghany and therefore its right to authorize issuance of the new stock was being challenged by appellees.

The Preferred Stockholders' rejection of offers to relax the injunction.

On several occasions during the course of the District Court proceedings appellees offered to cooperate with the court and defendants' counsel to arrange for a voluntary rescission under which the preferred stockholders would recover their old securities and be placed in *status quo ante* (R. 89, 91, 92). The District Court itself invited this procedure (R. 91). None of these overtures was ever accepted by Alleghany or the other appellants who took the position that a rescission could not be effected and that they would stand on their rights (R. 89, 91). The preferred stockholders never disassociated themselves from this position or sought to take advantage of the District Court's suggestion and appellees' offer. "All or nothing" became and continues to be the thematic approach of the appellants to this case.

The District Court's order has had the practical result of freezing the new preferred stock in the hands of the original stockholders.

This is conceded in Alleghany's brief at pages 18-19, and its Statement as to Jurisdiction at pages 28-29.

Affirmance of the District Court's judgment will make possible expeditious relief to the "frozen" stockholders.

Appellees have at all times stated, and now again repeat, that when, as and if the judgment below is affirmed they will move promptly in the District Court for an order restor-

ing the *status quo ante* and returning to the "frozen" preferred stockholders their old securities. In fact, the District Court has expressly reserved this right to the appellees (R. 674).

If, on the other hand, this court upholds the jurisdiction-assuming order, the District Court will have to consider the new preferred stock plan, approved by the I. C. C.'s §20a order, upon the merits. It will thus either concur or disagree with the S. E. C.'s findings made after a full hearing, that the plan is "grossly unfair" to the common stock and "potentially deceptive" to investors as well as contrary to "the public interest". (*In the Matter of Alleghany Corporation*, S. E. C. Investment Company Release No. 2446, November 30, 1956). Whether it will first remand the plan to the I. C. C. for an evidentiary hearing or review it on the present record will also have to be determined. Any final order the District Court makes will of course be subject to appeal to this court.

SUMMARY OF ARGUMENT.

I.

The Court below correctly held that the common stockholders were "threatened with serious harm" and thus had standing to sue. Both the status and the preferred stock orders are reviewable because of Alleghany's attempt to vest I. C. C. with illegal jurisdiction to authorize the issuance of 48 million dollars of securities prohibited by the S. E. C. under the Investment Company Act.

The I. C. C. has not challenged appellees' standing to sue. There is no merit to Alleghany's contention that appellees, suing in their own right individually and on behalf of all common stockholders of Alleghany, did not meet the tests established by this court in the *Moffat Tun-*

nel case, (1933) 289 U. S. 113, 119, and in *Pittsburgh & West Virginia Railway Co.*, (1930) 281 U. S. 479, 487. The S. E. C. found that the preferred stock Plan is "potentially deceptive" to investors, not "appropriate in the public interest", and is "grossly unfair" to the common stockholders. The District Court found that the unlawful acts of the I. C. C. "have deprived plaintiffs of the preferences, privileges and protection" of the Investment Company Act *and* the Interstate Commerce Act against "manipulation by those in control of Alleghany Corporation". These findings conclusively establish injury to the common stockholders' legal rights and interests deriving from the I. C. C. orders, while at the same time establishing that their financial interest differs from that of the preferred stockholders and that this action is therefore not within the bar of the *Moffat* or *Pittsburgh* cases.

The I. C. C. admits that Alleghany was "a person not a carrier" after January 19, 1954. Therefore the I. C. C. order granting Alleghany carrier status changed its status from that of an unregistered investment company subject to regulation by the S. E. C. under the Investment Company Act to that of a carrier subject to regulation under the Interstate Commerce Act, and commanded its obedience thereto, thus bringing this case within the test for reviewability found by this court in *Rochester Telephone Co.* v. *United States*, (1939) 307 U. S. 125.

If appellees had no standing to review the I. C. C. orders in a statutory three-judge court, the judgment appealed from is that of a one-judge District Court and is not reviewable here.

Alleghany itself has no standing to appeal here with respect to the alleged "continuing effect" of the 1945 I. C. C. and S. E. C. orders for 17 months after its divestiture of control of the Chesapeake & Ohio System on Jan-

uary 19, 1954. The real purpose of this contention is to create a defense for Alleghany's Chairman, Young, and its President, Kirby, for use elsewhere in a derivative action brought by Alleghany's stockholders for an accounting. This same contention has previously been characterized as "frivolous" by the District Court in the derivative action. Even if true, this contention is sterile in result with respect to the appeals herein because Alleghany's alleged control of Central was acquired after January 19, 1954 in violation of the 1945 I. C. C. order, assuming its "continuing effect", and, if the I. C. C. order did not continue in effect, the new stock was delivered in violation of §18(d) of the Investment Company Act, assuming, as next argued by Alleghany, the consequent revival of the 1940 S. E. C. registration. And even if the 1945 S. E. C. order continued in effect so as to exempt Alleghany from the registration provisions of the Act, the Exchange Offer was illegal under §7(a)(1), (2) and (4), the provisions of the Act relating to unregistered investment companies, and under Section 7(a) (2), (4) and (5) acquisition of Central control was also illegal.

II.

All appellants concede that if Alleghany did not acquire control of Central, the I. C. C. is without jurisdiction herein. Therefore the court was correct in voiding the I. C. C. order assuming jurisdiction over Alleghany Corporation, since the record did not support its finding that Alleghany had acquired control of New York Central on May 26, 1954 as a result of a proxy contest, nor did I. C. C. make adequate supporting findings.

On May 26, 1954 Alleghany owned only 11,400 shares of Central stock, while Young, Kirby, Murchison and Richardson owned for their personal account 1,000,200 shares out of 6,447,410 outstanding, and had received proxies "running to themselves and associates individually"

for an additional 2,310,000 shares. Alleghany's 11,400 share holdings were thus too minimal to constitute substantial evidence that it had acquired control of Central on May 26, 1954. The subsidiary finding that the 15 nominees elected to the Central board in 1954 had been "chosen" by Alleghany or were "allied" with it for the purpose of giving it control of Central is wholly unsupported. Not only is there nothing in the record to show that these nominees were dominated or controlled by or beholden to Alleghany, but the uncontroverted facts are to the contrary, for 13 of these nominees were actually engaged in their own businesses and had no connection whatsoever with Alleghany.

The I. C. C. erred in basing its findings solely on the sworn recitals of Alleghany's public relations officer and rejecting contrary documentary evidence, including the proxy statement in the Central contest signed by Young. As a matter of law the record conclusively establishes that Young and Kirby, together with their associated nominees, rather than Alleghany, acquired control of Central on May 26, 1954.

Alleghany's subsequent purchases of 300,000 shares of Central stock in July, 1954, and its acquisition of voting rights to another 300,000 shares did not operate to take control of Central from Young and Kirby and the other directors of Central and to vest it in Alleghany, since Young and Kirby control Alleghany's voting rights and holdings of Central, and personally continued to own with Murchison and Richardson a total of 700,000 shares.

As a matter of law Alleghany could not have acquired control of Central between January 19, 1954 and December 9, 1955. Both the full Commission and the District Court properly found that Alleghany lost its carrier status on January 19, 1954, and that the 1945 I. C. C. order did not

perpetuate its carrier status after that day. These unchallenged, unappealed and unreversed findings have become the law of the case by virtue of which Alleghany became an unregistered investment company for at least 14 months. If it acquired control of Central during that period by stock purchase or otherwise, as it claims, it did so in violation of §7(a) of the Investment Company Act which prohibits such acts by an unregistered investment company. If, as contended by Alleghany, §15(2) of the Interstate Commerce Act continued the 1945 order in force, thus giving Alleghany refuge from the S. E. C., then Alleghany acquired its claimed control of Central in violation of the Interstate Commerce Act, since that order required Alleghany to deposit its Central shareholdings in a voting trust with the Chase National Bank, as trustee, and prohibited interlocking directorates between Central and Alleghany. Accordingly, Alleghany, Young, and Kirby have doubly violated that order and the Act.

III.

Assuming that Alleghany has control of Central and the 73 carriers comprising the New York Central System, §5(2)(a)(i) of the Interstate Commerce Act required Alleghany to apply for an order authorizing the acquisition of such control. When Alleghany refused to do so, its refusal rendered its alleged *de facto* control illegal and, as a matter of law, required dismissal of its application to acquire control of one affiliated carrier. *United States* v. *Marshall Transport Co.* (1944), 322 U. S. 31. The District Court correctly held that the I. C. C.'s finding that Alleghany had acquired control of Central and was not required to apply to it for authorization to acquire such control, was a double misinterpretation of §5 with undesirable consequences.

The legislative history of the Transportation Act of 1940 clearly indicates that Congress intended that a non-

carrier person such as Alleghany seeking control of a railroad system of two or more carriers, was required to submit itself to the jurisdiction of the Commission by applying, in the first instance, for approval of such control as being in "the public interest." The legislative history also makes clear that the amendments to §5 made by the Transportation Act of 1940 were directed specifically at non-carrier holding companies such as Alleghany and were drafted with Alleghany in mind to clear up a specified "ambiguity" that may have existed in the 1933 Act, and which, along with Young's activities, were the subject of Sen. Report No. 180 (75th Cong., 1st Sess.). The subsequent Senate investigation of Alleghany (1937-1940) made clear the importance of "the public interest" findings which it now seeks to avoid, if in fact it does control Central.

The requirement that a non-carrier holding company is required to apply to the I. C. C. for permission to control a system of two or more carriers was specifically upheld by Division 4 in this case and was confirmed by the District Court. In 1945 both Alleghany and the I. C. C. construed §5(2)(a)(i) to apply to the acquisition of control of "a single established system". The contrary interpretation of this section by the full Commission in this case is also inconsistent with its administrative practice under §20a (12) in regard to the New York Central companies.

Alleghany having sought, and, according to its claim, having acquired control of Central without I. C. C. permission, the Commission should have dismissed its application for carrier status under the authority of the *Marshall Transport* case and the I. C. C.'s prior administrative interpretation of its statutory duties.

IV.

The jurisdiction-assuming order made under §5(3) of the Interstate Commerce Act was made in violation of the Act. §5(3) applies only when a non-carrier person is authorized by an order entered under §5(2) to acquire control of one or more carriers if the non-carrier person is already in control of one or more carriers, or of two or more carriers if the non-carrier person is not in control of any carrier. Even assuming that Alleghany controls Central it did not acquire control of another "carrier" by the Big Four-Bridge Company "merger" and lease "modification" nor by the Boston & Albany transaction for both the Big Four and the Boston & Albany were "lessors" not "carriers", as those terms are used in §§1 and 5. In addition, the Big Four already had 100% ownership and control of the Bridge Company, so that there could be in law and fact no "acquisition of control" by the "merger" and "modification" of the Big Four lease with Central which merely substituted 100% of the Bridge Company's properties in place of 100% of its stock. The I. C. C. findings did not authorize Alleghany to acquire control of any carrier and there was no finding by Division 4 or by the full Commission that any of the transactions constituted an acquisition of control, a mandatory statutory finding necessary to bring the transaction within the scope of §5(3), and thereby to invest Alleghany with lawful "carrier" status.

The order assuming jurisdiction over Alleghany merely authorized a "continuance of control" and did not authorize Alleghany "to acquire control of any carrier or of two or more carriers". *The Chesapeake and Ohio Railway Co. Purchase* case (261 I. C. C. 239) involved not an acquisition of control by virtue of a merger but a specific "acquisition of control through ownership of stock" of the C & O

System carriers; and hence is authority to sustain the judgment of the District Court.

The failure of Young and Kirby to join in the Alleghany application was fatal and required its dismissal under authority of the *Marshall Transport* case.

V.

Although, for the reasons set forth in Points II, III and IV, hearing the appellees was not necessary to establish the Commission's lack of jurisdiction, its orders were invalid for that reason also. Having demonstrated a direct interest in the I. C. C. proceedings by showing that they were common stockholders, and that the assertion of I. C. C. jurisdiction would deprive them of the benefits and protection of the Investment Company Act, and that the proposed preferred stock issue might result in the dilution of their holdings and in the diminution of the value of their stock, appellees acquired a direct and financial interest in the I. C. C. proceedings entitling them to be granted a full evidentiary hearing. Such a hearing is mandatory under §5(2)(b) of the Interstate Commerce Act, and after having granted them interested-party intervention status, it was error for the Commission to refuse to hear the appellees. Despite their interested-party status no notice or opportunity for hearing with respect to the Boston & Albany transaction was given to appellees.

The issues tendered by appellees in their pleadings were relevant, crucial and related to the public interest. To give §5(2)(b) the interpretation claimed for it by appellants would render it unconstitutional as permitting a deprivation of property without due process of law.

Merely receiving and reading appellees' pleadings did not constitute a hearing. The language of §5(2)(b) requiring the Commission to "afford reasonable opportunity

for interested parties to be heard" is not merely notification language: it commands the hearing which the Commission denied.

The Administrative Procedure Act required a hearing even as to matters of discretion, including such discretion as reposed in the I. C. C. with respect to appellees' right to a hearing in the preferred stock docket as distinguished from the status docket. The Commission's failure to grant a hearing in the preferred stock docket was arbitrary and was reviewable under the Administrative Procedure Act [5 USC 1009(e)].

VI.

The injunction made by the District Court was a proper exercise of its equity powers to prevent 48 million dollars of void and defective securities from passing into the hands of innocent persons. In confirmation of the propriety of this injunction were the subsequent S. E. C. findings that the new Preferred Stock was not "appropriate in the public interest", was "potentially deceptive" to investors, was prohibited by §18(d) of the Investment Company Act, and was "grossly unfair" to the common stockholders. Thus the injunction was clearly within the court's equity powers under the Urgent Deficiencies Act. *Chicago Junction* case, (1924) 264 U. S. 258, 269-270.

Alleghany disrupted the *status quo* by issuing the tainted securities while the District Court had before it a motion for a temporary injunction against the jurisdiction-assuming order. When its counsel subsequently informed the Court that unless a final injunction were granted, it would distribute the remaining undelivered 400,000 shares, the District Court was confronted with a challenge to its authority which left it with no alternative but to invoke its injunctive powers.

The preferred stockholders, far from being "innocent" purchasers, are actual parties to the Exchange Offer contract which produced the new securities. That contract expressly made the obtaining of an appropriate (valid) I. C. C. order approving the new securities a pre-condition of the validity of the new securities. The condition was never fulfilled and the new securities never achieved a valid status as issued securities. Moreover, the pre-condition was notice to the old preferred stockholders who became parties to the Exchange Offer contract, of such a nature as to impute to them express notice of the jurisdictional infirmities in the I. C. C. orders, which they might easily have discovered had they made the inquiry required of a prudent person under the circumstances.

By the express terms of §47 of the Investment Company Act (15 U. S. C. Sec. 80a-46) the Exchange Offer was a contract void under that section both as to Alleghany and as to the preferred stockholders. The provisions of the section extend to the latter because the notice of the jurisdictional defect in the I. C. C. orders was imputable to them by the duty they were under to make the investigation which the circumstances required and which would have revealed the liability of Alleghany under the Investment Company Act and the invalidity of the Exchange Offer because of Alleghany's unregistered status.

The court below and appellees repeatedly offered to relax the restraining order and reconstitute the *status quo ante* pending final adjudication, but Alleghany and the Preferred Stockholders rejected all such offers preferring to gamble on all or nothing of the voluntary stock Plan.

Any hardship devolving upon the preferred stockholders was therefore self-inflicted and not a ground for a balancing of the equities as to them. Alleghany admits that all the new stock is "frozen" in the hands of the original Preferred

stockholders. Meanwhile, 2,298,700 shares of common stock with a market value of 13 to 23 million dollars have been sold in the public markets since Alleghany registered in December 1955 with the S. E. C., thereby creating intervening equities on behalf of genuinely innocent investors which appellants would inequitably destroy.

Affirmance of the judgment of the District Court will enable appellees to move that Court for relief appropriate to the restoration of the *status quo ante*, a procedural step within the powers of the District Court under *Porter* v. *Warner*, (1946) 328 U. S. 395, and one expressly reserved to appellees in the District Court's Supplemental opinion (R. 674).

POINT I.

The court below correctly held that the common stockholders were threatened with legal injury and had standing to sue. Both the status and the preferred stock orders are reviewable because of Alleghany's attempt to vest I. C. C. with illegal jurisdiction so as to issue 48 million dollars of securities prohibited by the S. E. C. under the Investment Company Act.[1]

A. The District Court found that Alleghany was seeking "refuge with the I. C. C." and had illegally deprived the S. E. C. of jurisdiction over it.

The District Court found, in the words of Judge Dimock:

> "The unlawful acts of the Interstate Commerce Commission have deprived plaintiffs of the preferences, privileges and protection of the Investment Company Act and the Interstate Commerce Act

[1] The I. C. C. has not challenged appellees' standing to sue. Nor did the United States, which did not appeal from the final judgment and which now affirmatively supports their right to review.

against manipulation of those in control of Alleghany Corporation, including the possibility of dilution of the equity of the common stockholders by conversion of the new preferred stock for which they would be remediless in spite of the adjudged illegality of the preferred stock." [Order granting preliminary injunction (R. 108)].

"* * * the effect of the action of the I. C. C. is to deprive the stockholders of an independent right not to have their status changed except as permitted by the terms of the Investment Company Act." [Opinion granting preliminary injunction (R. 611)].

"In none of the cases cited by counsel in support of the argument that plaintiffs have no standing did the plaintiffs have such a direct interest in the question as the suitors here" [*Id.* (R. 611)].

The "manipulation" by "those in control of Alleghany" included transactions other than the preferred stock proposal. As the S. E. C. informed the I. C. C. without visible effect on the latter, these were barred by the Investment Company Act and "may have been contrary to the best interests of public investors in Alleghany" (R. 192). No less than 3 such transactions involving the lending of $7,500,000 of Alleghany's funds to Murchison and Richardson and $1,078,000 to the same persons and to Kirby and Young "in connection with the New York Central proxy contest" (R. 198) were called to the attention of the I. C. C. by the S. E. C. All of these questioned transactions took place during the year 1954 in which Alleghany was seeking (to quote the court) "refuge with the I. C. C." (R. 617). The latter agency, however, gave no recognition to these facts nor to the fact that the new preferred stock was of a character explicitly condemned by the Congress under the Investment Company Act.

1. The S. E. C. found that the new securities were not "necessary or appropriate in the public interest or consistent with the protection of investors" and affirmatively found that the new preferred stock had "complicating and undesirable features", was "potentially deceptive" to investors and was "grossly unfair" to the common stockholders.

Alleghany claims that appellees and the common stockholders, on whose behalf they sue, do not have "a legal right or interest that will be injuriously affected by the order", citing *Moffat Tunnel League* v. *United States,* (1933), 289 U. S. 113, 119. Alleghany further claims that appellees have no standing to sue because their "financial interest does not differ from that of every investor" in the company, citing *Pittsburgh & West Virginia Ry.* v. *United States,* (1930) 281 U. S. 479, 487. Such contentions ignore the findings summarized in the above heading, and which are set out in full at pages 107-110 of this brief.

2. Substantial injuries peculiar to the common stockholders are conclusively established by both the S. E. C. and District Court opinions.

The record below showed that no less than 8 injuries would be inflicted on the common stockholders as a result of the I.C.C. orders:

(1) The Court found that they would lose their "preferences, privileges and protection" under the Investment Company Act (R. 108, 610-611).[2]

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[2] As the District Court stated:

"Indeed what they claim here is a right to protection as stockholders against management regardless of the effect of that protection upon the welfare of the corporation. That which they seek is the right of a stockholder not the right of a corporation." (R. 610).

For a short summary of these rights under the Investment Company Act, see Appendix B to this brief.

(2) The Court found that appellees would also lose their "preferences, privileges and protection" under the Interstate Commerce Act (R. 108, 615-619).[3]

(3) The preferred stockholders would receive a new security with a 6% dividend rate, prior to the common's claim on the company's income, instead of the old 5½% rate (R. 524-525).

(4) The preferred stockholders would exchange securities that have no right to convert into common stock (R. 525) for new securities carrying such rights and exercisable until at least May 1, 1970, or for a minimum period of 15 years (R. 530). Such securities are outlawed, as the S. E. C. found, by §18(d) of the Investment Company Act.[4]

(5) The new securities had a current market value of roundly 48 million dollars compared with a maximum legal claim of 33 million dollars, indicating that the preferred stockholders would profit by a premium of at least 15 million dollars *over* 100% of their claim.[5]

(6) The common stockholders lost the right given them by §25(b) of the Investment Company Act to request the S. E. C. to render an advisory report "in

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[3] These protections include, as Alleghany itself notes, the statutory requirement that the I. C. C. only authorize a carrier to issue securities if "the carriers' proposed issue 'is for some lawful object within its corporate purposes, and compatible with the public interest' and also fair to stockholders (§49 U. S. C., Section 20(a)(2); *Schwabacher* v. *United States*, 334 U. S. 182, 198, 199 (1948))." (Alleghany brief, p. 36, footnote**).

[4] In the *Matter of Alleghany Corporation*, Investment Co. Act, Release No. 2446, — S. E. C. — (November 30, 1956).

[5] Prior to the time the I. C. C. issued its final order dated June 22, 1955, approving the issuance of the new preferred stock and overruling appellees' objections both to its jurisdiction and to the stock's issuance, the 10 shares of the new stock to be given for 1 share of old were quoted in the open market on June 15, 1955 at more than $348 compared with the old stock's maximum legal claim of only $237 per share, giving the new issue a total value of roundly 48 million dollars to satisfy a total claim of only 33 million dollars. (*Ibid.*, see footnote 20, at pp. 21-22.) The I. C. C. was alerted to such facts by appellees before it issued its order (R. 541-542).

respect of the fairness" of the preferred stock plan and "its effect upon" the common stock *prior* to any solicitation of security holders.[6] Since the S. E. C. found that the plan "would appear to produce a grossly unfair result" to "the existing common stockholders", it is obvious that those of them not identified with Young and Kirby would not have voted to accept it had there been full disclosure of the facts.[7]

(7) The I. C. C. arbitrarily and without notice or opportunity to be heard, altered the Exchange Offer contract so as to give each share of the old preferred a right to convert the new preferred stock into 47 shares of common instead of 34 shares.[8]

(8) The I. C. C. itself found that the exercise of the conversion rights "will at that time have the effect of diluting the rights of the common stockholders, as such

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[6] *Ibid.*, pp. 10-11, footnote 12a.

[7] The common stock had to authorize by vote creation of the new 6% Convertible Preferred Stock because "the Board of Directors * * * does not now have the power to issue such stock as convertible stock." (Alleghany Proxy Statement dated January 14, 1955, R. 293).

[8] When the common stockholders voted to create the new stock and the preferred stockholders accepted the Exchange Offer, it was represented to them that the conversion ratio was to be fixed on the basis of "the closing price of the common stock on the New York Stock Exchange on the closing date of the exchange offer." (R. 525, 290, 345). Under the Exchange Offer the closing date was "the fifth day (excluding Saturday, Sunday, and any legal holiday) after we [I. C. C.] have issued an order, *substantially in the form requested*, authorizing the proposed issue." (R. 521, 333). Without prior notice to intervenors and without the approval of the stockholders, Division 4 arbitrarily changed the date for fixing the conversion ratio to "the last day preceding the date of our order." (R. 535). This was done allegedly "to eliminate the possibility of manipulation" (R. 535). Yet it constituted an arbitrary manipulation by Division 4. The closing price of Alleghany's common stock on June 6, 1955 (the closing date actually set by Alleghany on the fictitious assumption Division 4's order was final) was $97/8 a share, and on June 29, 1955 (the correct closing date based on the final I. C. C. order of June 22, 1955), $10¾, a share. On the basis of the June 6th date the ratio would have been 39 shares, and on the latter date, 34 shares (R. 347). By use of the May 25 closing of $8¾, the ratio became 47 shares. (See conversion table, R. 347).

rights then exist" (R. 530). "* * * Such conversions will tend to reduce the net asset value of the common stock if such value at such time exceeds approximately $4.50 a share" (R. 530).

Since the injuries set forth in (1) through (8) were inflicted upon the common stockholders as a class and since the preferred stockholders are the beneficiaries thereof, it is obvious that appellees suing both in their own right as common stockholders and in behalf of the common stock as a class have "a legal right or interest that will be injuriously affected by the order." (*Moffat* case, supra), and that their "financial interest" clearly "differs" from that of the preferred stockholders. (*Pittsburgh* case, supra)[9]

3. Alleghany is not entitled to have the status order survive the voiding of the preferred stock order.

Alleghany argues that "review of the preferred stock order *alone* would have provided the appellees with complete practical protection" (Alleghany br. p. 34).[10] This

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[9] In the *Pittsburgh* case, Mr. Justice Brandeis excepted from those cases not reviewable in a three-judge court, "Orders entered in cases of reorganization, and in some cases of acquisition of control of one carrier by another" (p. 487). The Exchange Offer obviously constitutes a reorganization of Alleghany's capital structure, while the status order is based on an alleged acquisition of control.

[10] Appellants support this contention by quoting the District Court's statement that "the status order, by itself, may not have been reviewable." (R. 661). The Court did not at that time have the benefit of the S. E. C. findings that were to issue 11 months later. The Court added, however, "nevertheless, once the ICC made its order approving the issuance of the new preferred, there arose a right to seek review of the preferred stock order and *also* of the status order on which the preferred stock order was based." (R. 661). It noted that the *Rochester* case, *infra*, held that until the "administrative order causes a plaintiff some individual harm", review is premature. But plaintiffs "were surely threatened with serious harm" (R. 661) by the preferred stock order that was based on the status order.

argument omits the fact that Alleghany's claim for standing to apply for the status order was only obtained by violating the prohibition of §7(a) of the Investment Company Act against an unregistered investment company acquiring control of another company (15 USC 80a-7).

Under the I. C. C. final findings as distinct from those of Division 4 which Alleghany's brief alone quotes, Alleghany lost its carrier status on January 19, 1954 (R. 513), but 17 months thereafter regained it by the challenged final status order of May 24, 1955.[11] The I. C. C. thereby in effect conceded, unlike Allgehany, that Alleghany had the status of an unregistered investment company for the intervening 17 months. It is, therefore, clear that the order changed Alleghany's "existing or future status" as an unregistered investment company under the Investment Company Act of 1940 into that of a "carrier" under the Interstate Commerce Act. Thus the I. C. C. status order here, as in *Rochester Telephone Co.* v. *United States*, (1939) 307 U. S. 125, 132, in substance and effect "denies an exemption from the terms of the statute" (i.e., the Investment Company Act).

In addition, the I. C. C. order requires Alleghany to comply with "the provisions of §20(1) to (10), inclusive, and §20a(2) to (11), inclusive, of the Interstate Commerce Act, * * * to the same extent that those provisions are applicable to The New York Central Railroad Company" (R. 447). These provisions require Alleghany to keep its reports and records pursuant to I. C. C. regulations, and prohibit issuance of any securities other than short-term notes without specific I. C. C. authorization and approval as to propriety and terms. Thus, under the *Rochester* rule the status order is reviewable because it "necessarily and immediately carried direction of obedience to previously

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[11] The pertinent I. C. C. findings are set out at page 55 of this brief.

formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority." (p. 144); "the road to the courts' jurisdiction seems to be clear" (p. 132).

Alleghany's contention is incorrect for another reason. Had the court below only voided the preferred stock order and not also the status order, none of the other "preferences, privileges and protection" of the Investment Company Act would today be available to the common stockholders, nor have been available to them during the past 14 months since Alleghany's registration with the S. E. C. under the Investment Company Act on December 9, 1955.[12]

Finally, to do as Alleghany suggests, the courts below would have to assume a non-existent agency jurisdiction and to find that appellees were without rights and remedies under the Investment Company Act. Appellants were obviously not entitled to such a concession.

Alleghany finally argues that under *Rochester* "Alleghany, not its minority stockholders" alone can seek review, but cites no authority for this assertion which conflicts with the well-established doctrine that "a denial of a private right of action to those for whose ultimate protection the legislation is intended leaves legislation highly publicized as in the public interest in fact sadly wanting, and even delusive, to that end." *Goldstein* v. *Groesbeck*, (1944, C A 2),

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[12] The practical value of this regulation was demonstrated during this period not only by the S. E. C.'s findings that the preferred stock offer violated the Act and was "grossly unfair" but by the refusal of the Division of Corporate Regulation of the S. E. C. to approve a transaction under which Alleghany would have sold 53,000 shares of its stock in Investors Diversified Services, Inc. to Murchison Brothers. On December 31, 1956, the S. E. C. discontinued the proceedings in which Alleghany and the Murchisons had applied for approval of this transaction. (*In the Matter of Alleghany Corporation and Murchison Brothers*, Investment Company Act Release No. 2464.)

142 F. 2d 422, 427.[13] Members of a class for whose protection a statutory duty is created may sue for injuries resulting from its breach. *Texas & Pacific R. Co.* v. *Rigsby*, (1916) 241 U. S. 33. Both the Interstate Commerce Act and the Investment Company Act were enacted in large part for the protection of security holders in the company regulated. With respect to the Interstate Commerce Act this Court stated in *Schwabacher* v. *United States*, (1948) 334 U. S. 182, 200:

> "Federal law requires that merger terms be just and reasonable to all groups of stockholders, in contemplation of the continued use of their capital in the public calling to which it has been dedicated."

And the Investment Company Act declares that "the national public interest and the interest of investors are adversely affected" [Sec. 1(b)] "when, among other things, investment companies fail to protect the preferences and privileges of the holders of their outstanding securities" [Section 1(b) (3)].

Alleghany's claim that its stockholders are excluded from review of its action is thus plainly untenable.

B. If appellees had no standing to seek review in a 3-judge court, the judgment below is not appealable and stands as the final judgment of a 1-judge district court.

As stated by Stern & Gressman in *Supreme Court Practice*, 2d Ed., (pp. 40-41):

> "The improper participation of the two additional judges in the district court proceedings does not

[13] Since the "essential objective of securities legislation is to protect those who do not know market conditions from the overreachings of those who do", a construction of the Act as failing to sanction such action would "leave such legislation little more than a snare and a delusion." *Charles Hughes & Co.* v. *S. E. C.* (1943, CA2) 139 F. 2d 434, 437-8.

render the decree void. The order is still 'the final order of a district court'. *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368, 381. The error only eliminates the jurisdictional basis for a direct appeal to the Supreme Court under § 1253. *Gully* v. *Interstate Gas Co.,* 292 U. S. 16; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386."

C. Alleghany has no standing to sue nor to appeal here with respect to the alleged "continuing effect" of the 1945 I. C. C. and S. E. C. orders.

Even assuming that the 1945 orders continued, as Alleghany argues, "in force until appropriately terminated by the respective agencies" (Alleghany br., p. 45), it is undisputed that Division 4 terminated the order in its status order of March 2, 1955 (R. 447), and that this termination was not appealed by Alleghany to the full Commission, nor to any court.[14] That the termination of this order was a mere administrative formality and did not carry with it any retroactive construction that the order had a continuing effect from January 19, 1954 through March 2, 1955, or until May 24, 1955 when the full Commission affirmed the order of Division 4, is made clear by the full Commission's own findings that Alleghany had lost its carrier status, i. e., had ceased to be a carrier on January 19, 1954 (R. 513) (See p. 55, this brief).

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[14] Alleghany in its Statement on Jurisdiction stated that the District Court

> "perhaps inadvertently, enjoined all parts of the 1955 order including that which terminated Alleghany's status as a carrier under the 1945 order." (p. 20, footnote)

That the court did not enjoin this part of the order was made clear by it in a *per curiam* opinion dated December 7, 1956 which is printed in full as Appendix C to this brief, and which was issued as a result of this very contention. This part of the order was not made a subject of appellees' appeal to the full I. C. C. (R. 489, 491-2) nor of the complaint or prayer for relief in the District Court (R. 32, 38). It therefore had no jurisdiction to annul it, even assuming it did so.

1. Alleghany's contention that the 1945 I. C. C. and S. E. C. orders immunized the effects of its divestment of C & O control on January 19, 1954 for 17 months thereafter is "frivolous" and an attempt by Young and Kirby to use this suit to procure a defense to personal liability elsewhere asserted.

In view of the facts set forth in the preceding section, Alleghany's argument based on the alleged continuing vitality of the orders in the intervening 14 to 17 months period after January 19, 1954, is merely an argument hopefully put forth to give Young and Kirby a defense to their acts which caused Alleghany to violate the Investment Company Act during the months in question in further respects than are at issue before this court.

District Judge Walsh, a member of the three-judge court, who also sat in the collateral case, disposed of this contention and also summarized the three-judge court's holding in the present case in the following language:

> "Defendants claim they relied on the continuing effect of the I. C. C. and S. E. C. orders even though they, of course, knew that the sale of the C. & O. terminated the only fact upon which these orders were based. That these orders had in law no effect after January 19, 1954, the date of the sale of the C. & O., was more fully explained in Breswick & Co. v. United States, supra. It now seems to me that, as a matter of law, their lack of legal effect was so obvious that professed reliance upon them in good faith is patently frivolous.
>
> The I. C. C. order determining Alleghany's status upon the basis of its control of C. & O. contained the usual language of a regulatory order that it continues until changed by subsequent order. Even though Alleghany's acceptance of such an order might estop it from noncompliance, there is no basis for concluding that it could shield Alleghany from complying with the Investment Company Act. There was

nothing actually inconsistent between Alleghany's submitting required reports to the I. C. C. and complying with the Investment Company Act too. And if in fact its compliance with the Investment Company Act did produce any conflict this would have led to the prompt termination of the I. C. C. order." (*Breswick & Co.* v. *Briggs*, 135 F. Supp. 397, 400).

If any further exegesis of the inadequacy of this contention is needed, we refer the court to the discussion in the above case at pp. 400-1. Suffice it to say that that discussion demonstrates that this argument is intruded here ostensibly on Alleghany's behalf but actually by defendants Young and Kirby as a means of obtaining a needed defense against personal liability asserted against them in the collateral case.

2. If the 1945 I. C. C. order continued in full force and effect for 17 months after January 19, 1954, that conclusion is nevertheless sterile in respect to the issues herein.

The argument of continuing effect, even if true, no longer has any materiality to the present issues and its use by Alleghany herein is demonstrably inappropriate, since Division 4 terminated the order on March 2, 1955, 4 months prior to the final order authorizing issuance of the preferred stock of June 22, 1955. Thus if the new status order of Division 4, as affirmed on May 24, 1955 by the full Commission, is void it is immaterial that the 1945 order continued in effect until formally terminated either on March 2, 1955 or May 24, 1955. It is the *new* status order, not the old one that provided I. C. C. with a jurisdictional basis for authorizing the stock by order of Division 4 dated May 26, 1955, affirmed June 22, 1955.

3. If termination of the 1945 I. C. C. order revived Alleghany's 1940 registration with the S. E. C., as now argued, that conclusion is also sterile with respect to the issues herein.

This argument assumes that the S. E. C. lawfully had jurisdiction over Alleghany, and that both the 1945 and 1955 I. C. C. orders are void.

If, as now claimed by Alleghany, the 1940 registration with the S. E. C. automatically revived, as a result of the termination of the 1945 I. C. C. order, the Preferred Stock issue which Alleghany seeks to legalize by action of this court was still in violation of Section 18(d) of the Investment Company Act as found by the S. E. C. on November 30, 1955.[15] Therefore Alleghany's argument is sterile because it could not avoid the prohibition of Section 18(d) applying to registered investment companies. If, on the other hand, it were a non-registered investment company, as the District Court held (R. 657) and as appellees contend, from January 19, 1954 to December 9, 1955, the date when it finally registered, Section 7(a) of the Investment Company Act, applying to non-registered companies, prohibited the very stock transactions by which Alleghany claims to have acquired control of Central in 1954 and with it the right to be regulated by the I. C. C., as well as prohibiting the Exchange Offer itself. [See Sec. 7(a)(1)(2), (4) and (5)].

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[15] The 1945 S. E. C. order terminated Alleghany's 1940 registration; it did not provide for immunity from the section of the Act applying to unregistered investment companies should Alleghany subsequently enter into that category by reason of no longer being "subject to regulation" by the I. C. C. See *Breswick & Co.* v. *Briggs*, 135 F. Supp. at 400-401. Only by obtaining an exemption order under Section 6(c) of the Act, could Alleghany be exempted from the provisions applying to unregistered companies [Sec. 7(a)]. It never so applied until February, 1956, and its belated application for retroactive exemption was then denied in the S. E. C. decision of November 30, 1956.

The above considerations make clear that Alleghany has no standing on this review to litigate the issues relating to the 1945 orders, and that they are injected here for their effect elsewhere.

POINT II.

The court below correctly held that the orders of the I. C. C. should be voided because the record did not support its jurisdictional finding that Alleghany had acquired control of New York Central.[1]

In its opinion by Judge Dimock granting the preliminary injunction the District Court found that "if the Commission's opinions contain a conclusion that Alleghany is in control of New York Central, those opinions lack sufficient findings to support that conclusion" (R. 624). In its *per curiam* opinion granting final judgment (per Frank C. J., Dimock and Walsh, D. JJ.) the District Court stated:

> "We believe that the ICC had no appropriate application before it for a determination of the question of control. The case cannot, therefore, be remanded for such a determination.***
>
> The ICC's orders purported to determine the question of control of Central but that determination cannot stand (a) because the findings as to Alleghany's control of Central are insufficient, (b) because the evidence does not support those findings, and (c) because plaintiffs were deprived of an evidentiary hearing on that issue of control" (R. 670).

A. The I. C. C.'s finding that Alleghany acquired control of Central on May 26, 1954 is unsupported in fact and law.

Division 4 made the following finding with respect to the date when Alleghany is alleged to have acquired control:

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[1] That the I. C. C. orders are void for lack of jurisdiction if Alleghany did not acquire control of Central is undisputed.

> "The capital stock of Central is widely held by the public, but control of its functions reposes in Alleghany and its officers as a result of a proxy contest preceding a stockholders' meeting of May 26, 1954, at which the nominees chosen by Alleghany were elected as Central's board of directors" (R. 417).

The Report of the Commission on reconsideration of Division 4's report also includes the following finding as to the date when control was allegedly acquired by Alleghany:

> "In view of the above stated divestiture by Alleghany of the stocks of carriers subject to the act, we conclude that at the time of its acquisition of control of the Central on May 26, 1954, it was in fact a 'person not a carrier' as that phrase is used in section 5(2) of the act" (R. 513).

1. On the date when the I. C. C. found Alleghany had acquired control it owned only 11,400 Central shares with a market value of less than $270,000 compared with 1,000,200 shares personally owned by Young, Kirby, Murchison and Richardson with a market value of $23,500,000.

On May 26, 1954 Alleghany owned only 11,400 out of the 6,447,410 outstanding shares of Central's capital stock (R. 394). The 15 directors elected on that date owned for their personal account, a total of 1,089,880 Central shares (R. 406, 394-5), of which 100,200 were owned by Young, 100,000 by Kirby, 400,000 by Murchison and 400,000 by Richardson (R. 407)[2]. None of these 1,089,880 shares

[2] The only mention of Murchison and Richardson and of their 800,000 share purchase of Central stock from the C & O is in a preliminary recital headed "Prior proceedings related hereto" in the Report of Division 4, in connection with earlier terminated proceedings instituted by persons other than the parties herein (R. 420-22). No consideration was given either by Division 4 or

were owned for the account of Alleghany, the record showing that all of them were "beneficially owned" for the account of the 15 individuals (R. 406-7)[3]. The closing price of Central on the New York Stock Exchange on May 26, 1954 was $23½ per share (*New York Times*, May 27, 1954, p. 47). Thus the individuals owned stock worth $23,500,000 compared with less than $270,000 owned by Alleghany.

The record also shows that Alleghany acted merely as "a clearing house and clerical headquarters" and lender of "the interim costs" of the personal proxy expenses of the 15 nominees in the 1954 contest (R. 405), and that Alleghany stated in its 1954 Annual Report which was released under date of April 19, 1954 that the proxy expenditures were made "on behalf of others" (R. 170).

In addition to omitting the above facts from their account of the ICC proceedings, appellants also omit reference to a resolution of the board of directors of Alleghany, adopted January 19, 1954, and which recites that Alleghany's directors actually *rejected* acquisition of Central control by Alleghany in favor of its being taken individually by Young and Kirby because in Young's opinion "control could perhaps be more easily secured by individuals than by a corporation" (R. 175, 179)[4].

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by the full Commission to the stockholdings of Murchison and Richardson on May 26, 1954, in relation to the question of who had acquired control.

[3] Despite this fact, the proxy statement for these 15 nominees was titled "Proxy Statement for the proposed Alleghany-Young-Kirby Ownership Board of Directors of The New York Central Railroad Company" (R. 405-410).

[4] On November 23, 1955, five days after the District Court issued its opinion granting final judgment to the appellees, Alleghany's house counsel and secretary testified in the Supreme Court of the State of New York that at no time did Alleghany's directors adopt a resolution authorizing Alleghany to acquire control of New York Central or nominating any Alleghany representative to the Board of New York Central or authorizing the solicitation of Alleghany proxies for the election of any person to its Board (R. 175-176, 179, 181-182). The record below dis-

The Alleghany brief also makes no reference to the sworn testimony of its Chairman which is not in the record of the proceedings below but which was given in the New York State Supreme Court on November 30, 1955, two weeks after the decision of the District Court granting final judgment to the plaintiffs. Young there admitted that Young and Kirby had sought control "as individuals", after which they proposed to "let Alleghany come in".[5]

Some 9 days after this testimony Alleghany registered with the S. E. C. on December 9, 1955, under the Investment Company Act of 1940 (R. 173-174).

Of the 15 directors elected to Central's board on May 26, 1954, only three (Young, Kirby and Van Pelt)[6] were officers or directors of Alleghany (R. 406-7). The record before

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closes that the only connection between the Alleghany Board and the proxy contest for control of Central consisted of ratifying "the action of certain officers of (Alleghany) in advancing funds of (Alleghany)* * * * to the Alleghany-Young-Kirby nominees * * *," a resolution adopted after the election had been held and the report of the inspectors of election received (R. 182, folio 341; R. 396).

[5] "I pointed out * * * that if Alleghany does embark upon this proxy fight it may run into complications with the I. C. C. and, therefore, it was much better for Young and Kirby to carry on the fight as individuals and then let Alleghany come in *after we had gotten control*, when the risk would be very much less and the legal complications much smaller.

"I pointed out to them (the directors) that we had discussed this with the I. C. C. and that they had advised us that there was no reason at all why Young and Kirby shouldn't come out and get control; although they indicated there was some question about Alleghany."

(Testimony of Robert R. Young at hearings before Referee Robert Fitzsimmons in *Zenn* v. *Anzalone*, N. Y. County Clerk's Index No. 7244/1954 at pp. 2345-2346).

Aside from Young's admissions relating to control, his disclosure that he had obtained a private and *ex parte* ruling by the I. C. C. is noteworthy in view of the adversary nature of the subsequent proceedings.

[6] Van Pelt resigned prior to the filing of Alleghany's status application on September 20, 1954, and was replaced by Alfred Perlman who is neither an officer nor director of Alleghany (unprinted record, pp. 1997-1998).

the I. C. C. discloses that each of these 12 non-Alleghany directors is independently engaged in his own business or profession (R. 406-7). The record is also barren of any evidence (and appellants point to none) that any of the 12 non-Alleghany directors who held and still hold 80% of the board's voting power, were or are agents of or under the domination or control of Alleghany.

None of these facts and figures (except Young and Kirby's personal stockholdings) were mentioned either in Division 4's findings or in the full Commission's findings relating to control of Central. Thus the I. C. C.'s findings that there was an "acquisition of control of the Central on May 26, 1954" (R. 513) by Alleghany and its officers were not made "on the record as a whole," *Universal Camera Corp.* v. *N. L. R. B.* (1951), 340 U. S. 474 and were diametrically opposed to the uncontradicted documentary record showing control formally lodged in the hands of the above-mentioned individuals.

As this court stated in construing the review provisions of the National Labor Relations Act and Section 10(e) of the Administrative Procedure Act [5 U. S. C. A. §1009(e)], in *Universal Camera Corp:*

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record" (340 U. S. at p. 488).[7]

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[7] "In reviewing the action of the Interstate Commerce Commission, the scope of any review of the action of the agency is limited by the provisions of 5 U. S. C. A. §1009(e). If the order complained of is based upon adequate findings founded on substantial evidence or is a rational conclusion of the matter involved *based upon a consideration of the entire record*, the reviewing court will not set the order aside. *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, 59 S. Ct. 754, 83 L. Ed. 1147; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308; *Illinois Central R. Co.* v. *U. S.*, D. C., 101 F. Supp. 317." *E. Brooke Matlach, Inc.* v. *United States* (1954 D. C. Pa.), 119 F. Supp. 617, 619. (Emphasis supplied.)

2. The I. C. C. finding that the 15 nominees elected to the Central board in 1954 were "chosen" by Alleghany, or were "allied" for the purpose of giving it control has no support in the record.

Division 4 found that "the nominees chosen by Alleghany were elected as Central's board of directors" (R. 417). On reconsideration the full Commission avoided making any finding that the nominees were "chosen" by Alleghany. Instead it held that "Alleghany *and its allied interests* have succeeded in electing sufficient members of the board to permit *them* to organize and elect their own officers" (R. 513) (Our emphasis).

Insofar as this constitutes a finding that the 15 directors organized and elected their own officers, it is a correct one. The record is barren of any evidence that Alleghany's Board at any time authorized the choice of any nominee for director of Central, or empowered any person at any time to designate anyone as Alleghany's nominee. Even if Alleghany "chose" the 15 directors, that fact would be insufficient to give it control unless it were shown that they were and are under the domination and control of and beholden to Alleghany. The record is barren of such evidence or findings. It is therefore impossible to find as a matter of law that Alleghany on the basis of its 11,400 share Central holdings or on its record of corporate action either chose or elected or dominates and controls Murchison, Richardson, or any of the other 13 directors. And 11,400 shares out of a total of 6,447,410 are plainly too minimal to constitute substantial evidence either of control or power to control.

Thus the conclusion that "Alleghany and its allied interests" acquired control, omits consideration of the crucial and necessarily negating findings, for whose support there is uncontroverted evidence, that the so-called "allied interests" were acting personally for their own private

profit and were "allied" only for the purpose of ousting the old Central management. There is no evidence in the record, and appellants cite none, that they were "allied" for the purpose of investing Alleghany with control over Central or over themselves as directors of Central. In fact, the record of Young, Kirby, Murchison, and Richardson, is conclusive that they permit no one to dominate or control them.[8]

3. The I. C. C. erred in basing its findings solely on the sworn and controverted recitals of Alleghany's public relations officer, in its jurisdictional application, instead of the uncontroverted documentary evidence signed by its Chairman and presented by appellees.

The jurisdictional application is verified by Thomas J. Deegan, Jr. (R. 210-234), whom the record discloses is Alleghany's Vice President in charge of Public Relations (R. 538). In its brief the I. C. C. concedes that this application is the source of "the evidence of record supporting these (control) findings" (Br., p. 64, fn. 12). This application, since its factual allegations in respect to the acquisition of control (R. 216-7) were continuously controverted by appellees before the I. C. C. from February 18, 1955 through June, 1955 (R. 393-404, 538-539), is obviously insufficient as a matter of law to support the I. C. C.'s findings (Cf. Rule 19, Commission's Rules of Practice). The documentary evidence represented by the proxy statement appears at page 405, *et. seq.* of the Record as Exhibit B to appellee Breswick & Co.'s amended petition for leave to

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[8] Young and Kirby control Alleghany by virtue of their positions as Chairman and President and their stockholdings. Appellee Breswick & Co. so alleged before the I. C. C. (R. 323, 395) and this allegation was never denied.

"Applicant Young and his associates control the policies of both Alleghany and the Chesapeake & Ohio." (*Chesapeake & Ohio Railway Co. Purchase*, (1948) 271 I. C. C. 5. 14.)

intervene filed February 18, 1955 (R. 392-410). Appellant Alleghany characterizes as "Admissions in the record by appellees" (Alleghany br. p. 93, I. C. C. br. pp. 64-71) an unamended pleading by Breswick & Co. dated February 4, 1955 (R. 322) and declares that it constitutes "evidence" that Alleghany acquired control. Not only were appellees Neisloss and Phillips not parties to that pleading, but the quotation is torn out of context, and the pleading was amended by that of February 18, 1955 to conform to the documentary evidence of the proxy statement (R. 392-410).

If the application be deemed "evidence" it is the only evidence upon which the I. C. C. bases its two crucial findings, first, that the 15 nominees were "chosen by Alleghany" and second, that Alleghany acquired control of Central, to quote Division 4, "as a result of a proxy contest preceding a stockholders' meeting of May 26, 1954, at which the nominees chosen by Alleghany were elected as Central's board of directors" (R. 417), or, to quote the full I. C. C., that "Alleghany, by stock ownership and by the favorable action of the stockholders acquired control of Central" (R. 511-512), and that "the time of its acquisition of control of the Central" was "on May 26, 1954." (R. 513).

4. The record is conclusive as a matter of law that Young and Kirby and their associated nominees, rather than Alleghany, acquired control of Central on May 26, 1954.

The record permits of no other conclusion than that Young and Kirby and the 13 other nominees, acting in their individual capacities, acquired control of New York Central "on May 26, 1954" by vote of the 1,089,000 shares of New York Central stock purchased by them for their personal account, plus the proxies for another 2,310,000 odd shares received by them (R. 395), and which were solicited on the representation that they held this large personal ownership interest (R. 406-7), and which were cast pursuant to

proxies "running to themselves and associates individually" (R. 395).

B. Alleghany's stock purchases after May 26, 1954 did not result in a wresting of control of New York Central by Alleghany from Young and Kirby and the 13 other directors.

The jurisdictional application makes certain recitals of fact which are repeated in the following findings of the I. C. C.:

> "Alleghany has an undivided half interest in 600,000 shares of Central stock with voting rights to the 600,000 shares under joint-venture agreements, and in addition, owns 15,500 shares. The voting rights of Alleghany represent almost 10 percent of the total shares of Central stock outstanding. The chairman of the board of directors of Alleghany, who holds the same position with Central, beneficially owns 100,200 shares of the latter's stock. The president of Alleghany is a director of Central, and beneficially owns 300,100 shares of the latter's stock. A vice president of Alleghany holds a similar position with Central." (R. 417)

The above acquisitions of stock by Alleghany took place 50 days *after* the annual meeting, and not on or prior to May 26, 1954, as the I. C. C. findings and as appellants' briefs imply. On July 15, 1954, Murchison and Richardson, after the market had declined to $22 per share (R. 43), sold to Alleghany at their cost price of $25 per share (but with a guaranty against loss) 150,000 shares each, or a total of 300,000 shares out of the 800,000 shares of New York Central stock (R. 197) acquired by them in February, 1954. In addition to these shares they placed another 150,000 shares each of said Central stock in the joint venture (R. 43), maintaining full ownership rights thereto, except for an alleged granting of voting rights to Alleghany (R. 217). Although citing Alleghany's "voting rights to

said 600,000 shares", and the fact that this represented "almost 10 percent of the total shares" outstanding, the I. C. C. made no mention of the fact that Alleghany's application showed, as of the record date of September 9, 1954, that the "ten principal stockholders" exclusive of Alleghany, held 1,928,604 Central shares (Unprinted Record, pp. 2000-2001) (R. 571-2), or almost 30% of the stock.

Between May 26, 1954 and September 20, 1954, the date of the filing of the jurisdictional application herein, Alleghany apparently purchased in the open market another 4,100 shares of Central stock giving it a total of 15,500 shares so purchased (R. 217).

In addition, in July, 1954, Richardson sold to Kirby at cost 200,000 shares of the 400,000 shares of Central stock originally acquired by him (R. 43). Thus, as shown below,*

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* Taking into consideration the different shifts of the 1,000,200 shares of Central stock personally owned by Young, Kirby, Murchison, and Richardson on May 26, 1954, the following had occurred:

N. Y. CENTRAL STOCK "BENEFICIALLY OWNED"

*As of May 26, 1954**	
Young	100,200
Kirby	100,000
Murchison	400,000
Richardson	400,000
11 other Central Directors	89,680
Alleghany	11,400
Total	1,101,280
*As of Sept. 20, 1954***	
Young	100,200
Kirby	300,100
Murchison	150,000
Richardson	150,000
11 other Central Directors	89,680
Alleghany	315,500
Total	1,105,480

* The record shows no change in these stockholdings between April 8, 1954, the date of the proxy statement (R. 405-410) and May 26, 1954.

** The date Alleghany's application was filed with I. C. C. (R. 210).

even as late as the commencement of the status proceeding before the I. C. C. the individuals continued to own 789,980 shares of stock compared with only 315,500 shares by Alleghany.

Under these circumstances, Murchison and Richardson's transfer of part of their holdings to Kirby personally and to Alleghany by means of joint venture agreements with the latter in July, 1954, did not constitute an acquisition of New York Central control by Alleghany since it could not and did not disturb Young's and Kirby's prior existing and *personal* control of New York Central acquired on May 26, 1954. Nor did it disturb the actual 80% control of the Central board by the 13 non-Alleghany directors, since these directors continued in office and at no time surrendered their "actual as well as legal control" or their "power to exercise control" to Alleghany [Section 1(3)(b)].

The subsequent stock purchases of 286,000 additional shares of New York Central stock which Alleghany counsel said were made by Alleghany between September 20, 1954 and December 31, 1954 (R. 263) but which are not referred to in the I. C. C.'s findings, do not alter the control status of the individuals as indicated above.

1. The I. C. C. failed to make findings with respect to the President and eleven other officers of Central.

In so far as the I. C. C. findings of control rest on the fact that "a (public relations) vice president of Alleghany holds a similar position with Central", the findings omit the fact that there are 14 officers of New York Central of whom only 2 are officers of Alleghany, and the further fact that the president of New York Central (Perlman) is neither an officer nor director of Alleghany (Unprinted Record, pp. 1997-1998), nor are 8 of its 9 vice presidents (R. 570-571).

2. The I. C. C. had no evidence to support its implicit finding that the 15 directors lost their personal control of Central as a result of Alleghany's stock purchases after May 26, 1954.

If it be assumed that after May 26, 1954 the 13 non-Alleghany directors on Central's board at any time lost their "actual as well as legal control" or their "power to exercise control", the I. C. C. made no reference to this point.[10]

3. The I. C. C.'s finding that the directors' "tenure in office" reposes in Alleghany ignores Young and Kirby's control of Alleghany's New York Central stockholdings.

Control is an "issue of fact to be determined by the special circumstances of each case." The Commission must look at the "actualities in such intercorporate relations." *Rochester Telephone Corp.* v. *United States* (1939) 307 US 125, 145-6.

The fact that Young and Kirby, as Alleghany's Chairman and President and dominant stockholders, control the right to vote *its* holdings of Central stock, and that Alleghany does not own or control *their* personal holdings of 400,000 Central shares or the holdings of the other Central board members, and that these board members together with Young and Kirby control Central's proxy machinery, are also "actualities" completely ignored by the I. C. C. It is obvious, as the District Court found, that "neither

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[10] As a matter of law the directors had the "power to exercise control" as long as they remained in office. If Alleghany by stock investments subsequent to the directors' election on May 26, 1954 had accumulated this power, there would have to be some evidentiary demonstration of that fact in the record. There is none. In fact the record shows that six brokerage firms, three banks and the Union Pacific Railroad Co. held as of record on September 9, 1954 no less than 1,928,604 Central shares (R. 571-2). This compares with the 600,000 shares whose voting rights were held by Alleghany as of the same approximate date (R. 217).

Division 4 nor the I. C. C. meet this issue squarely" (R. 624).

Appellees' allegation that Young and Kirby control Alleghany and its Central stockholdings was uncontroverted (R. 323, 395). In these circumstances it is clear that the I. C. C. was required to find that Alleghany's stockholdings of Central, if controlling stockholdings, were *auxiliary* to Young and Kirby's, so as to give them "actual control" of Central or "power to exercise control" [Section 1(3)(b)].

C. As a matter of law Alleghany could not have acquired control of New York Central between January 19, 1954 and December 9, 1955.

1. Both the I. C. C. and the District Court found that Alleghany lost its carrier status on January 19, 1954, and that the 1945 I. C. C. order did not perpetuate its carrier status after that date.

The full I. C. C. found in its Report on Reconsideration:

> "The record shows that on or about January 19, 1954 Alleghany divested itself of its remaining stocks of the Chesapeake System, and no longer controlled or had the power to control another carrier subject to the act * * *" (R. 513).
>
> "In view of the above stated divestiture by Alleghany of the stocks of carriers subject to the Act, we conclude that at the time of its acquisition of control of the Central on May 26, 1954 it was in fact a 'person not a carrier' as that phrase is used in Section 5(2) of the Act * * *" (R. 513).
>
> "As appears from the foregoing discussion Alleghany at the time it filed its application [September 20, 1954, (R. 415)] was in fact a person not a carrier which controlled an established system" (R. 515) (Bracketed matter supplied).

Thus, under the I. C. C.'s final findings [as distinct from those of Division 4 which alone are quoted by the I. C. C. (p. 45, footnote 9) and Alleghany (p. 40) in their briefs on this point], Alleghany was no longer "subject to regulation under the Interstate Commerce Act", which fact was the sole basis for its claim of exemption from the Investment Company Act [Sec. 3(c)(9)].[11] Since it lost its carrier status on January 19, 1954, Alleghany had no carrier status at the time it filed its application for the status order on September 20, 1954, and did not again become a carrier by I. C. C. order until May 24, 1955 when the full Commission affirmed the March 2, 1955 order of Division 4. This was precisely what the District Court held, except that it also held the two I. C. C. orders void insofar as they vested Alleghany anew with carrier status based on the September 20, 1954 application.[12]

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[11] These findings of the I. C. C. conclusively establish that Alleghany's contention is without foundation that Sec. 15(2) of the Interstate Commerce Act perpetuated its carrier status under the 1945 order after January 19, 1954.

In its brief (fn. p. 46) the I. C. C. states "We have some doubt as to whether, where the factual basis for an order has disappeared, the order can be regarded as continuing in effect indefinitely until specifically revoked. * * *" It believes the order continues "for at least a reasonable period to enable the Commission * * * to determine * * * whether the facts have changed as alleged." No one denied the fact of Alleghany's divestment of its C. & O. stock. Actually, in March, 1954, as Division 4 relates "inquiries by our representatives disclosed no reasonable evidence upon which to question the validity or the effect of Alleghany's divestment itself of the stock of, and representation on the board of directors of Chesapeake." (R. 421).

[12] Misled by a letter written to it after oral argument, the District Court changed its original finding of the latest date on which Alleghany lost its carrier status from January 19, 1954 to May 21, 1954 (R. 657) but upon being informed of the facts, cancelled the change (R. 680). Thus its findings agree with the full I. C. C.'s.

2. Under the I. C. C.'s unchallenged findings Alleghany became an unregistered investment company for 17 months, and acquired its alleged control of Central in violation of the Investment Company Act.

As a consequence of this intervening 17 months loss of carrier status following divestment of control of the Chesapeake System, Alleghany was by the necessary implications of the I. C. C.'s own findings, a non-registered investment company between January 19, 1954 and at least March 2, 1955, subject to the provisions of the Investment Company Act of 1940.[13] Under Section 7(a)(4) and (5) of that Act a non-registered investment company may neither lawfully engage in interstate commerce nor acquire control of any company which is so engaged. If Alleghany acquired control of Central on May 26, 1954 it did so by solicitation of proxies in interstate commerce and, if it acquired control thereafter and before December 9, 1955 it did so by purchase of securities in violation of Section 7(a)(2). It is obvious therefore, that such acquisition of control by either method was squarely prohibited by the Investment Company Act.

3. Even assuming that Section 15(2) applied, by the terms thereof the 1945 I. C. C. order expired on January 19, 1954.

All appellants, except the I. C. C., attack the finding of the District Court that Section 15(2) "relates solely to rate orders *or the like*" (R. 655). They omit consideration of the italicized words. It should be noted that this finding was made in connection with an "alternative argument" of Alleghany that assumed the invalidity of the I. C. C.'s 1955 status orders (R. 654-5).

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[13] Actually, in view of the invalidity of the March 2, 1955 and subsequent I. C. C. orders, it was a non-registered investment company for 23 months until December 9, 1955 (R. 173), on which date it finally registered with the S. E. C.

Section 15(2) continues orders in force "Except as otherwise provided in this chapter * * * or for a specified period of time, according as shall be prescribed in the order." Section 5(3), pursuant to which the 1945 order was issued, requires that the non-carrier "shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control." Thus Section 5(3) orders have a time limitation of their own and are excepted from 15(2) by the words therein previously quoted.

The 1945 order shows on its face that Alleghany "shall be considered as a carrier * * * to the same extent that those provisions (of Section 20 and 20a) are applicable to the Chesapeake and Ohio Railway Company and its carrier subsidiaries and affiliates." (R. 185)

The 1945 I. C. C. report expressly states Alleghany's agreement that Section 5(3) was to apply to it and that this and the other conditions imposed by the order were to continue "only so long as said control (of the C & O) continues." 261 I. C. C. 239, at 241.

Finally, on January 28, 1954, Alleghany's counsel wrote the I. C. C.: "The conditions surrounding the authorization of Alleghany to control Chesapeake & Ohio depended upon continued control of Chesapeake & Ohio. They were co-extensive in time with such control *and did not endure after Alleghany ceased to exercise the authority granted it by the order.*" (R. 274-5) (Emphasis supplied). Alleghany thereafter acted consistently with this advice, as the record shows, ignoring the requirement to deposit its Central stockholdings with the voting trustee prescribed in the order, and ignoring the ban on interlocking directors.

4. If Alleghany is correct that Section 15(2) of the Interstate Commerce Act extended the 1945 order for 14 months after January 19, 1954 then it acquired its claimed control of Central in violation of that Act.

The I. C. C.'s 1945 order authorized Alleghany to acquire control of Chesapeake System

> "*Provided, however,* that this authorization and approval are granted subject to the express conditions numbered (1), (2), and (3), relative to the depositing of stocks with independent voting trustees and to the elimination of interlocking directors set forth in said report." (R. 184).

Condition (2) required that:

> "Alleghany • • • shall deposit with The Chase National Bank • • • as independent voting trustee **all voting stocks of carrier corporations subject to** regulation under the Interstate Commerce Act, not at present affiliated with the Chesapeake & Ohio System whether now owned *or hereafter* acquired." (emphasis supplied) *Chesapeake & Ohio Railway Co. Purchase, etc.* (1945), 261 I.C.C. 239, 262.

Provision (3) required that no

> "interlocking directorates • • • shall be entered into as between Alleghany • • • and • • • any company, the stock of which is trusteed." (*Id.*)

If Alleghany be correct and if the 1945 order did survive for 14 months after January 19, 1954 until terminated by Division 4, it is clear that order barred Alleghany from buying any stock in the New York Central Railroad unless it were deposited with a voting trustee, and also barred Young and Kirby from becoming interlocking directors with Central. If Young's testimony subsequently given

elsewhere is to be believed, he knowingly violated the 1945 order when he with Alleghany acquired control of Central between January 19, 1954 and March 2, 1955.[14]

5. Alleghany's holdings of Central's securities were merely an investment and were not of a controlling character.

In this connection see Alleghany's own statement that:

> "* * * The Splawn report dealt extensively with the distinction between an investment company and a railroad holding company. It pointed out that an investment company 'by definition assumes none of the responsibilities of management and control of the companies whose securities it holds.'* The holding company on the other hand was stated to be a company which not only invested in railroads but exercised control of them. The recommendations leading to the enactment of Section 5(3) recognized this distinction.** Congress was not interested in regulating investment companies that merely held railroad securities and nothing more. It was interested in and prescribed regulation by the ICC of the companies which *controlled* one or more railroads" (R. 261).

> "* House Report 2789, 71st Cong., 3rd Sess. 1931, p. 1690.
> "** House Report 2789, pp. X, XI, XXVI, XXXI, 1735, 1736."

[14] On December 8, 1955 three weeks after the decision of the District Court granting plaintiff's final judgment, Young testified in the New York State Supreme Court in *Zonn* v. *Anzalone*, New York County Clerk's Index No. 7244/1954 as follows:

> "Q. Would you be good enough, Mr. Young, to tell us what Senator Wheeler advised you? A. Senator Wheeler advised me that the 1945 order requiring Alleghany Corporation to trustee any voting shares of railroads which it might acquire would continue in force and effect even though we had decontrolled C. & O., until the I. C. C. by its own motion, dissolved the order.
>
> That is my present recollection of Senator Wheeler's advice to me, which he confirmed by visits to the I. C. C. and conversations with them subsequently."
> *Hearings before Referee Fitzsimmons*, p. 3094.

This testimony is not in the record below.

On the facts and the law herein, it is clear that Alleghany is only an investment company that merely holds New York Central securities "and nothing more".

POINT III.

If Alleghany does control the 73 carriers comprising the New York Central System, Section 5(2)(a)(i) of the Interstate Commerce Act required it to apply for an order authorizing the acquisition of such control. Its refusal to apply rendered such de facto control illegal and as a matter of law required dismissal of its Section 5(3) application for carrier status.

As the District Court found, I. C. C. approval is required for a non-carrier such as Alleghany to acquire control of the 73 carriers in the New York Central System.[1] Alleghany's entire defense to its failure and refusal to apply under this section is that the word "carriers" in the fourth clause of Section 5(2)(a)(i) of the statute should be read as "systems".

The District Court adequately and correctly disposed of this contention in the following words:

> "Under Section 5(2) I. C. C. approval is required for the acquisition of two or more carriers. The statute says 'carriers', not 'systems', yet the I. C. C. has here held that control of a previously affiliated system may be obtained by a non-carrier corporation without its approval. Under similar circumstances the I. C. C. entertained applications for approval of the acquisition of a carrier holding company in Weinstein-Control-Capital Transit Co. and Montgomery, 56 M. C. C. 127, and Seaboard Air Line Ry. Co. Receivership, 261 I. C. C. 689. We believe that

[1] Division 4's report lists the 73 carriers in an appendix (R. 417; 444-446). Section 5(2)(a)(i) is printed at page 87 of this brief.

where a non-carrier acquires control of the parent corporation of a railroad system it acquires control of the subsidiaries and consequently of 'two or more carriers' so as to require I. C. C. approval. The Commission mentions no authority in support of its position * * *" (R. 618).

A. The District Court Correctly Held that the I. C. C. had "Doubly Misinterpreted" Section 5 with "Undesirable Consequences."

In treating of the questions of legislative and statutory history, the District Court found:

> "Consideration of the purposes of the statute emphasizes the destructive aspect of the construction put forward by the Commission. Congress was concerned with three problems: the consolidation of carriers into economically sound systems in accordance with a national plan of transportation to be developed by the I. C. C.; the affiliation of carriers through common parents; and the regulatory control of non-carrier parents. Each presented questions of fundamental nationwide importance, and constituted the very heart of the constructive, progressive program for which Congress looked to the Commission, rather than something to be avoided under the pressure of less important though perhaps more immediate tasks. Further, contrary to the views which apparently guided the Commission, Congress did not seek to hide or quiet controversy. It felt that the protection of the public lay in public exposure, as well as the expertness of the Commission. In Section 5(b), it set forth not only the mandate that interested parties be heard but also the authorization for public hearing and the requirement of notice to the governors of affected states for both consolidation and acquisition of control.
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> "Here the Commission would escape any responsibility as to the acquisition of the Central by Alle-

ghany, and focus public attention only upon the merger of the Louisville and Jeffersonville Bridge and Railroad Company into the Big Four, all the while trying to keep regulatory control of Alleghany and thus preclude any consideration of the matters by the S. E. C. The undesirable consequences of the Commission's double misinterpretation of section 5 thus become all the more pointed. Alleghany's actions with respect to the New York Central and the use of its funds in that connection were transactions of a nature that Congress regarded with particular concern. Its concern was expressed in the Investment Company Act which imposed restrictions upon management of companies similar to Alleghany, and provided for regulation of these companies by the S. E. C. Its concern was also manifested in section 5 which, before the advent of the S. E. C., attempted to enable the I. C. C. to reach companies such as Alleghany. Here, the I. C. C.'s action defeats both plans for regulation" (R. 618-619).

B. The loophole in the 1933 Act and its closure in the 1940 Act.

The I. C. C.'s brief categorically states that Alleghany's acquisition of control of the New York Central System "was not an acquisition of control of two or more carriers which required the Commission's approval under Section 5(2)(a)(i) of the Interstate Commerce Act" (I. C. C. br., pp. 47-60, 84-110).[2]

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[2] Both the I. C. C. (br., pp. 47-60) and Alleghany (br., pp. 71-77) contend that a non-carrier person's acquisition of control of the New York Central System of 73 carriers is not, in the words of the fourth clause of Section 5(2)(a)(i) of the Interstate Commerce Act, an acquisition by a non-carrier person of "control of two or more carriers through ownership of their stock *or otherwise*." They argue that "carriers" should be read as "systems." The italicized words were added to the Emergency Transportation Act of 1933 by the Transportation Act of 1940. (See I. C. C. br., p. 109, fn. 15).

As we shall demonstrate, one of the principal purposes of the 1940 amendments to then sections 5(4) and 5(6) of the 1933 Act (48 Stat. 217), was to prevent such a loophole from being interpreted into the Act, and resulted in Sections 5(2) and 5(4) in the form in which they now appear in the Transportation Act of 1940.

1. The first Congressional investigation of Alleghany's activities (1931-1932)..

Early in 1930 the House of Representatives, in response to a complaint made in the I. C. C.'s Annual Report for 1929, passed House Resolution No. 114 to investigate the ownership and control of railroads by holding companies. The I. C. C. report specifically mentioned Alleghany. Commissioner Eastman, as Chairman of the Legislative Committee of the I. C. C., testified before the House Committee in support of subjecting railroad holding companies to I. C. C. jurisdiction.[3]

In its 1931 annual report to Congress, the I. C. C. stated:

> "We are also of the opinion that *if* a holding company *is allowed* to control a carrier by rail through ownership of stock, thereafter the accounts and capitalization of that holding company should be subject to regulation by the Commission". (Emphasis supplied) [45 I. C. C. Ann. Rep. 85-6].

A similar recommendation was made by the I. C. C. in its 1932 Annual Report.

2. Alleghany and the Emergency Transportation Act of 1933.

In order to obtain, among other objectives, regulatory supervision over holding companies such as Alleghany, Congress on the basis of the facts revealed in its 1931-1932 investigation, enacted the Emergency Transportation Act

[3] See House Report No. 2789, 71st Cong., 3d Sess. 1931.

of 1933. This statute added to the Transportation Act of 1920 the section now numbered Section 5(3), and amended Section 5(2) so as to require I. C. C. approval before "a person which is not a carrier" could "acquire control of two or more carriers through ownership of their stock."

Alleghany is cited in the House Report on the legislation as a "striking illustration" of the inadequacy of the old (pre-1933) Section 5 in coping with the problem created by holding companies engaging in acquisitions of stock control of railroads [H. Report No. 193, 73rd Cong., 1st Sess. (1933), p. 20; Hearings on H. R. 9059, 72nd Cong., 1st Sess. (1932), pp. 21-26, 48-50].

3. The Senate Investigation of Alleghany's activities (1935-1940).[4]

So notorious had Alleghany's activities become by 1935 that during the 74th Congress Senate Resolution 71 was passed authorizing the Committee on Interstate Commerce to conduct an investigation of railroad holding companies and affiliated companies. Its subsequent investigation is embodied in some thousands of pages of hearings and reports extending over the years 1937 to 1940. (See footnote 6 hereafter.) The very first series of hearings were concerned with the financial practices and policies of Alleghany Corporation which had been under the control of its organizers, the Van Sweringen brothers of Cleveland, (1929-1935), and had then passed into the control of George A. Ball of Muncie, Ind. (1935-1937). The controlling stock in Alleghany was purchased from the Ball interests by

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[4] This legislative history is completely omitted by all appellants. The United States correctly contends that under the legislative history no "acquisition or control" took place as a result of the "merger" but as will be seen hereafter its summary is too broad in stating: "Section 5 • • • refers only to those acquisitions whose result is to combine previously separate carriers under common control" (br., p. 34).

Robert R. Young and Allan P. Kirby on May 5, 1937.[5] Thereafter the Senate Committee was largely preoccupied with following the maneuvers of Young and Kirby and delineating the prior history of the management of Alleghany by the Van Sweringens, and their avoidance of statutory regulation.[6]

4. Senate Report No. 180 calls attention to the loophole in the 1933 Act.

Four years after the enactment of the 1933 Amendments to Section 5, the Senate Committee issued its first report, dated March 15, 1937, pursuant to Sen. Res. 71 (74th Cong.) authorizing its investigation.[7] This report, a forerunner of 27 more installments to come, related to what the Committee termed various transfers of control of Alleghany Corporation. It reviewed in detail the creation of the corporation in 1929 by the Van Sweringen brothers, the subsequent sale of its controlling stock to George A. Ball and the subsequent vesting of that controlling stock by Mr. Ball

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[5] In Young's words: "This empire • • • • changed hands • • • • yesterday." (Sen. Rep. No. 25 (1940), part 27, 76th Cong., 3rd Sess. P. 1, entitled: "*Alleghany System-Acquisition of Control by Robert R. Young.*") The same report added that "The Chairman of the sub-committee commented on these frequent shifts of control • • • as though the subject matter of these transfers had been a simple and proper article of commerce." (P. 20).

> "The Chairman • • • Here is a $3,000,000,000 railroad empire, and by reason of the existence of holding companies (it) is tossed around like a toy balloon from one person to another during a period of 6 years time without any governmental control or agency saying anything about it." (P. 20).

[6] See in this connection Sen. Rep. No. 180, 75th Cong., 1st Sess. and Rep. No. 25, Parts 2, 3, 4, 5 (76th Cong., 1st Sess.) and Rep. No. 25, Parts 7, 8, 9, 10, 11, 16, 25, 26 and 27 (76th Cong., 3rd Sess.) and Rep. No. 1182, 76th Cong., 3rd Sess.

[7] S. Rep. No. 180 (1937), 75th Cong., 1st Sess., "*Midamerica Corporation:* Extent and Adequacy of Interstate Commerce Commission Jurisdiction over Railroad Consolidation and Holding Company Control."

in a corporation called Midamerica. Young and Kirby acquired the controlling shares in Alleghany from Midamerica. Senate Report No. 180 reviewed no less than 5 "changes in control" (pp. 8-9) preceding the Young-Kirby acquisition, and stated that this total of 6 changes raised the following three questions (p. 11):

> "(1) Under existing legislation [i.e., under Section 5 as amended in 1933] does the Interstate Commerce Commission have power either to pass upon an acquisition of this nature, or to exercise effective supervision of the use of the control so acquired to the extent necessary to protect the public interest; (2) Is it necessary or desirable for the Commission to have such power; and (3) if necessary, or desirable, what form should such power take, what should its scope be, and how should it be administered." [bracketed matter supplied][8]

The Report then discussed the application of Section 5, as amended in 1933, to the acquisitions of control of carriers already controlled in a common interest and reached the conclusion that the statute was "ambiguous" in this respect (p. 11). In this connection the Committee stated:

> "It would seem difficult to draw from the prohibitory language of Section 5(6)[9] an affirmative grant of authority to the Commission to approve transactions other than those expressly covered by the clear language of Section 5(4)[10]. On the other

[8] The mere headings in the Senate Report are significant. These include: "Changes in Control Summarized", page 8; "Present Act may make Midamerica acquisition illegal and incapable of validation by Commission approval", page 12; "Present act may not reach Midamerica acquisition at all", page 12; "Present act may make Midamerica acquisition illegal unless validated by Commission approval", page 13; "The legislative history does not disclose clearly the Congressional intention", page 14.

[9] Then Section 5(6), now Section 5(4).

[10] Then Section 5(4), now Section 5(2).

hand, there may be considerable question whether the mere acquisition of a previously established common control of two or more carriers—the mere substitution of a new common interest—falls within the meaning of the expression 'accomplish or effectuate control in a common interest.' It may be argued that if it had been intended that Section 5(6) should apply to acquiring, thus, unaltered, a control previously centered in a common corporate receptacle as well as to the initial combining of carriers previously separately controlled, the one word 'acquired', used in Section 5(4) would have expressed that thought clearly and consistently. Had it been used, a common basis for interpretation of the two sections as covering the whole field would have been established. Instead, however, different words were used, which, it may be contended, are capable of being construed as intended to make illegal only the active combining of carriers previously separately controlled and not the acquisition of control of several carriers already commonly controlled.

"Under such an interpretation the two sections are neither coextensive nor completely complementary. There would be some types of transactions which are neither declared illegal nor subjected to Commission approval. Such types could be carried through without any public supervision. The Mid-america transaction might be such a case (p. 12, 13). • • •

"It is by no means impossible that the courts might adopt this third view and hold that mere transfers of control of railroad systems assembled as complete systems prior to June 16, 1933, are illegal, whether accomplished by transfer of the stock of the carriers themselves or by transfer of the stock of intermediate holding companies, unless such transfers are approved by the Commission.

"On the other hand, however, Congress simply may have failed to anticipate these methods of trad-

ing in railroad sytems and failed to provide for their regulation" (pp. 13-14).

The Committee made the following recommendation:

> "The Committee believes that Congress should revise Section 5 of the Interstate Commerce Act, in order to make unnecessary fine-spun argument concerning its meaning and should state a clearly defined policy with respect to the activities of super holding companies such as Midamerica Corporation" (p. 16).[11]

The Committee added that such revision should await a more careful study of the holding company problem as a whole. Such a study ensued in the Committee's hearings held over the next four years and in the 27-parts to its reports that followed.

The result was that when the Transportation Act of 1940 was enacted the activities of Alleghany had been so emphatically and legislatively high-lighted that there could no longer be legitimate doubt that the loophole in §5 because of "The ambiguity of the language" (S. Rep. 180, p. 14) had been closed so as to extend the Commission's jurisdiction to a non-carrier person's acquisition of control of a unified system by stock purchase or otherwise.

5. Congress, in the 1940 Act, closes the loophole.

The following quoted provisions of §5, enacted by the Transportation Acts of 1933 (48 Stat. 217) and 1940 (54 Stat. 905) are pertinent to an analysis of the question presented:[12]

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[11] Senator Burton K. Wheeler who approved this report as Chairman of the Committee was also Chairman when the 1940 amendments were enacted.

[12] The italicized words and numbers were added by the Transportation Act of 1940; the words and numbers in brackets, from the original Emergency Transportation Act of 1933, were omitted in the 1940 Act; all other matter is old matter retained.

"Sec. 5 * * * *

"[4] (*2*) (a) It shall be lawful with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) * * * * for a *person* [corporation] which is not a carrier to acquire control of two or more carriers through ownership of their stock or *otherwise* * * * *."

"[6] (*4*) It shall be unlawful for any person, except as provided in paragraph (*2*) [4] *to enter into any transaction within the scope of subparagraph (a) thereof, or* to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."[13]

By adding "or otherwise" to the methods of acquiring control that were forbidden without I.C.C. authorization, Congress obviously intended to include the acquisition of

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[13] Section 1(3)(b) defining control explicitly was added by the 1940 Act so as to "cover relationships between corporations, companies, associations, etc.", since the term 'person' is defined to include artificial as well as natural persons." Conference Report on S. 2009 (1940), H. R. Rep. No. 2832, 76th Congress, 3d Sess., p. 63.

control of Central's 73 carriers by Alleghany or Young and Kirby. Without these words, these non-carrier persons merely acquired control of one carrier, The New York Central Railroad Company through ownership of *its* stock, control of the other 72 carriers being acquired not "through ownership of their stock" by Alleghany, but only because the parent company, Central, owned or controlled their stock.

The above amendments definitively cured the very "ambiguity" of which Senate Report No. 180 complained. By changing subparagraph (6), now (4), to include among the forbidden transactions any "within the scope of subparagraph (a)" as amended, Congress obviously added thereto the act "to acquire control", the omission of which Report No. 180 complained had made the 1933 statute ambiguous.

This crucial and controlling aspect of the legislative history of the amendments to the 1933 Act are not alluded to in any of appellants' briefs.

C. The Subsequent Administrative Actions of the I. C. C. Coincide with the District Court's Finding that a Control Application was Required by the 1940 Act.

1. Division 4's interpretation of the statute, unlike that of the full Commission, concurred with the District Court's.

The District Court's construction of the statute was identical with that of Division 4 which held (R. 425):

> "The Central system includes many individual carriers which are controlled by Central through stock ownership or otherwise. We long have recognized under section 5, that railroad systems are comprised of two or more carriers, and that control of a single system may not lawfully, be effectuated

without our approval and authorization.[2] That principle is considered basic, almost as a definition. So much so, that the question of acquisition of a carrier system has never been contested before the Commission, and as far as we know, there have been no court decisions touching on that issue.

"[2] For example, see *Seaboard Air Line Ry. Co. Receivership*, 261 I. C. C. 689, 717. *New York S. & W. R. Co. Reorganization*, 282 I. C. C. 801, not printed in full. *Arkansas & L. M. Ry. Co. Control*, 282 I. C. C. 254, 260. *Weinstein-Control-Capital Transit Co. and Montgomery*, 56 M. C. C. 127, 131. *Stoughton-Control-Delaware Coach Co.*, 57 M. C. C. 456. *Kittrell-Control-Dixie Motor Coach Corp.*, 37 M. C. C. 91." (R. 425).

* * * * * *

"In what appears to be an inconsistency, Alleghany's counsel also argued that because Alleghany (a non-carrier railroad holding company) has control of a major railroad system, it should continue to be considered as a carrier subject to our jurisdiction. That conclusion could be justified under the Act, only on the grounds that Alleghany controls more than one carrier subject to the Act" (R. 426).[14]

The full Commission did not reject Division 4's interpretation of the statute on the merits, nor analyze or refer to its case citations. Instead it differed with Division 4's interpretation in the following language:

"As Central, at the time of such acquisition of control was recognized as a single established system, we conclude that the transaction was not within the scope of the above stated provisions of Section

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[14] Concerning this Division 4 said:

"Alleghany's intention is clearly shown as not to include a request for authority to control Central and the carriers of its system * * *.

"Undoubtedly, the application herein was prepared and presented according to the applicants' best interpretation of requirements under Section 5 of the Act." (R. 428).

5(2) of the Act and that our approval was not necessary'' (R. 513-514).

No authority, judicial, administrative, or statutory, for this radical reading of ''two or more carriers'' as ''two or more systems'' was given in the I. C. C.'s report or in the appellants' briefs. Yet, when it came to the application to merge a subsidiary (the Bridge Company) in the 73-carrier system into another subsidiary (the Big Four), both Alleghany and I. C. C. read the same statutory language in the present case as applying to the merger because they represent it as an acquisition by Alleghany of a carrier which, with its assumed and unauthorized control of Central gives it control of ''two or more carriers'', and which as Division 4 noted, is to say the least, ''an inconsistency.''

2. Both Alleghany and the I. C. C. in 1945 construed Section 5(2)(a)(i) to apply to acquisition of control of "a single established system".

On December 7, 1937, the I. C. C. approved the acquisition by the C & O from Alleghany of 49½% of the controlling stock in New York, Chicago & St. Louis Railroad Co.[15]. At the same time it found that the C & O already had working control of the Pere Marquette and that the granting of the application would result in C & O also obtaining control of the Nickel Plate. *New York, Chicago & St. Louis R. R. Co. and Erie R. R. Co. Control* (1937), 224 I. C. C. 259.[16]

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[15] Colloquially known as ''the Nickel Plate''.

[16] The Commission found that:

> ''• • • acquisition by The Chesapeake and Ohio Railway Company of control of the New York, Chicago and St. Louis Railroad Company and the Erie Railroad Company, by purchase of stock upon the terms and conditions proposed, will be in harmony with and in furtherance of the Commission's plan for the consolidation of railway properties, and will promote the public interest'' (224 I. C. C. at p. 269).

As a result of this decision the C & O, Nickel Plate and Pere Marquette became part [to quote the I. C. C.'s description of the 73-carrier Central System (R. 513-514)] of "a single established system."[17]

On February 7, 1944 the I. C. C. instituted a proceeding (Docket No. 29085) against Alleghany, Young and Kirby as respondents in accordance with the provisions of §5(7) of the Interstate Commerce Act for the purpose of determining whether the respondents had acquired control of the above 3 carriers in violation of §5(4). After 5 days of evidentiary hearings and the filing of briefs in which respondents admitted they had made no control application under §5(2), a Proposed Report was issued by Examiner Boles in which he found that the failure to make the control application was fatal. In his report he stated:

> "The legislative history of the 1940 Act, however, does not show, as contended by respondents, that the amendments made by that act did not enlarge the scope of the section so as to make it applicable to the acquisition of control of several carriers already under common control (p. 48).
>
> "The plain letter of the law makes it unlawful for any person except as provided in paragraph (2) to enter into any transaction within the scope of subparagraph (a) thereof. One of the transactions permitted with the Commission's approval and authorization is the acquisition by a person which is not a carrier of control of two or more carriers through ownership of the stock or otherwise (p. 49).
>
> • • • • • •
>
> "The Commission should enter an order requiring Alleghany, Allan P. Kirby and Robert R. Young, and the Chesapeake & Ohio, its officers and directors, to take such action as may be necessary in the opinion

[17] "System" is not statutorily defined.

of the Commission to prevent a continuance of such violation. * * *[18]

"There remains * * * the supplemental application of Alleghany joining in the application under section 5(2), and seeking an order thereunder approving and authorizing the acquisition by it of control of the Terminal Co. through Alleghany's alleged control of the applicant. (p. 57)

* * * * * * *

"As the Commission should find that Alleghany has acquired control of the Chesapeake & Ohio without its approval and authorization and in violation of section 5(4) of the Act, it should also find that Alleghany is not a proper party to the application and should dismiss its supplemental application therein." (p. 59)

In re Alleghany Corporation Control,
Docket No. 29085, Proposed Report.

After the filing of the Examiner's Report, Alleghany acquiesced in the views expressed therein and filed an application for authority to acquire control of the single system represented by the C. & O., Pere Marquette and Nickel Plate and their subsidiaries and affiliates. *Chesapeake & Ohio Railway Co. Purchase, etc.,* 261 I. C. C. 239, at pages 240, 241.[19]

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[18] A second violation of the Act was found by the Examiner in that Alleghany had also acquired control of United States Trucking Corp., a carrier subject to Part II of the Act (p. 56).

[19] Contrary to the representations in Alleghany's brief (pp. 10, 68, 73) and the I. C. C.'s (pp. 4-5, 18), it was pursuant to this application (and not the application by the C&O, in which Alleghany joined, for the C&O to acquire the properties of its wholly-owned subsidiary, Norfolk Terminal Co.) that resulted in the 1945 order investing Alleghany with carrier status under Sec. 5(3). See Alleghany's stipulation to this effect, 261 I. C. C. at page 241; and the 1945 order (R. 183-185). The District Court corrected this misstatement (R. 617) but counsel continue to ignore these facts.

The I. C. C. approved the control application which, in view of the *Nickel Plate Control* decision (1937) (224 I. C. C. 259), the Examiner's Proposed Report as above quoted, Alleghany's acquiescence therein, and the 1945 I. C. C. order thereon, constitutes an administrative precedent interpreting the 1940 Act as requiring a control application when there is an acquisition of control of the parent company of several carriers already under common control.

3. The I. C. C.'s reading of "carriers" as "systems" is inconsistent with its practice under Section 20a(12) in regard to the New York Central companies.

Under § 20a(12) of the Interstate Commerce Act it is unlawful "for any person to hold the position of officer or director of more than one carrier unless such holding shall have been authorized by order of the commission". The I. C. C. has not held in Central's case that "carrier" must be read as "system". Nor does Alleghany or New York Central so read the law. As will be seen from the record herein there are listed no less than 12 I. C. C. orders in 1954 and earlier, permitting such interlocking directors and officials among the carriers of the Central system (R. 219, 569-571).

Under the contention of the full Commission where control is an issue, the statute should be read so as to replace the word "carrier" with the word "system", since "all the properties within the carrier's orbit were under long-established single operating control" (R. 512). However, its prior administrative policy of not construing section 20a(12) in the same manner is persuasive argument against now so construing section 5(2). It will be noted that the I. C. C., under section 20a(12), as under section 5(2), is required to make findings of substantially the same

effect as to the public interest, or in the words of the former provision, "that neither public nor private interests will be adversely affected thereby."

4. Alleghany can not lawfully evade the requirement of Section 5(2)(b) that its alleged control of Central be approved only if found "consistent with the public interest."

Section 5(2)(b) provides with respect to a transaction proposed under 5(2)(a):[19a]

> "If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and *will be consistent with the public interest,* it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: * * *".

Division 4 reported:

> "Among its other arguments, Alleghany's suggestion that a decision contrary to its views would result in requiring approval by us whenever a board of directors of a carrier corporation is replaced by the stockholders' election, also is untenable. To reason thus ignores the distinction between election of individuals as directors and control of the board of directors. The latter situation seems to have arisen when Alleghany, through the ownership of stock and the naming of a board of directors of its own choosing or otherwise, assured itself of control of the board of directors of Central and its related carriers. As a consequence, a holding company and those in control thereof, admittedly acquired control of a carrier which controls subsidiary carriers. In our

[19a] The pertinent part of the statute is set forth in the I. C. C. Brief, p. 80.

> opinion the Congress sought to prohibit that type of acquisition of control, unless approved and authorized by us upon consideration of an application, and upon our finding that the proposal would be consistent with the public interest" (R. 426).

The full Commission evaded this argument by a counter-argument as follows:

> "To give Section 5 an interpretation which would require our approval each time stockholders decide to change directors of established system properties, or to elect new officers, and, consequently, to install new management would have a tendency to set in motion within the organizations contending forces which might well impair or destroy the results of legitimate integration. Although Congress has subjected the merging of railroad properties in many respects to regulation in order to prevent abuses and to protect the public interest, we do not believe it intended for Section 5 to be construed in a way that might produce undesirable results. Our interpretation of this section is to the contrary" (R. 512).[19b]

This is another way of saying that it is not in the public interest to find, as Congress required, that an acquisition of control of two or more carriers through ownership of stock or otherwise is "consistent with the public interest".

But the District Court rejected this argument:

> "* * * The Commission mentions no authority in support of its position but it does express its distaste

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[19b] These generalities are supported by no concrete examples. Alleghany's brief (pp. 73-75) and the I. C. C.'s (pp. 57-60) express concern for the fate of proxy contests if 5(2)(a) and (b) are obeyed. But, assuming *arguendo* the validity of this concern, this is not an issue for the courts, nor of legislative intention since the legislative history is clear. Furthermore, Congress is presently studying the subject of proxy contests, including that for control of New York Central. See hearings before a subcommittee of the Senate Banking & Currency Committee, 84th Cong., 1st Sess., on S. 879, "*Stock Market Study: Corporate Proxy Contests*", pp. 1427-1505.

> for the controversies into which it would be projected if it complied with a literal reading of the statute. We believe its position unsound and that it constitutes a surrender of power which Congress regarded as important to the public interest. The attendant difficulties conjured up by the Commission are greatly exaggerated. Without undue trouble it should be able to distinguish the usual proxy contest from the acquisition of holdings by a single person or corporation of such a block of stock that it has taken control from the other stockholders" (R. 618).

Advance approval of a mere proxy contest *per se* obviously could not be required, absent acquisition of controlling blocks of stock, because there would be no substantial evidence to support a finding of acquisition of control. After the contest, and again assuming no acquisition of controlling blocks of stock, there would be no acquisition of control by the elected directors since they hold office only as a result of the uniting of the majority of scattered stockholders for the transitory moment when they come together to cast their votes, thereby constituting a controlling voting power which immediately thereafter is dissipated again into the thousands of units of individual ownership.

D. The I. C. C. Was Required to Dismiss the Application Herein if Alleghany Controlled Central Without its Approval.

The I. C. C. brief (p. 62) expresses the astonishing formulation that:

> "Nothing in the Act remotely suggests that only *approved* control of carriers by a non-carrier will serve as the basis for subjecting a non-carrier to regulation as a carrier. If Alleghany has acquired control of New York Central illegally, there are

other remedies, such as those provided by Section 5(7) and (8), to deal with that situation more appropriately than by the conclusion below that Alleghany may not be regulated at all."

This court in *United States* v. *Marshall Transport Co.* (1944), 322 U. S. 31 explicitly rejected the theory that a non-carrier could escape the "public interest" findings required by the Act by not first obtaining an "approved control of carriers by non-carriers".

Congress declared in the Investment Company Act "that the national public interest and the interest of investors are adversely affected" [Sec. 1(b)] when, among other things, "investment companies * * * fail to protect the preferences and privileges of the holders of their outstanding securities;" [Sec. 1(b)(3)]. These "preferences and privileges" are enforced by Section 7(a), 18(d), and 25(b) among others. Thus the I. C. C. argument ignores "the national public interest and the interest of investors" as declared by the Congress. If Alleghany, in acquiring control, violated both the Investment Company Act and the Interstate Commerce Act, as the I. C. C. argument here necessarily assumes, how may the I. C. C. properly find as it did (R. 443) that Alleghany's application to control the Bridge Company is, as required by 5(2)(b), "consistent with the public interest" and "just and reasonable".[20]

Such a finding is inconsistent with the I. C. C.'s prior administrative interpretation of its statutory duties.

"The act clearly intends that our consideration under section 5 be accorded to 'proposed' transac-

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[20] "No court should encourage violation of the clear statutory policy by enforcing performance of such a contract", namely one that "would have been illegal and under 49 U. S. C. A. 5(4), and 5(7) and 10(1) would have made each of the parties guilty of a crime." *Alleghany Corp.* v. *The James Foundation of New York, Inc.*, (1954 C. A. 2d) 214 F. 2d, 446, 450.

tions in determining whether they will be in the public interest. We are of the opinion that we may not properly approve this application and sanction the law violation which has now continued for more than two years." *O. J. Mitchell-Purchase*, 5 Fed. Carrier cases, 50, 51 (1945).

"The act clearly intends that consideration be given by us to whether 'proposed' transactions under Section 5 will be in the public interest [citing cases]; and we have given our approval to concluded transactions under that section only in comparatively rare instances where the parties had acted in entire good faith, appropriate applications were filed promptly upon appraisal of the unlawfulness, and the transaction clearly was consistent with the public interest [citing cases]. The acts of the parties in unlawfully acquiring and continuing control of Bingler have been a distinct handicap to us in the discharge of our statutory duty to consider the entire transaction in all of its phases." *Benjamin, et al.* v. *Casser-Control-Bingler Vacation Tours, Inc.*, 7 Fed. Carrier cases, 605, 606 (1950).

Although the District Court called the I. C. C.'s attention to the above case (R. 672), counsel have not commented upon it.

It is true that "there are other remedies, such as provided by Section 5(7) and (8)" to deal with Alleghany's illegal acquisition of control, if such control was acquired.[21] But in the first instance the piecemeal acquisition of the alleged controlling blocks of stock violated §7(a) of the

[21] I. C. C. could not determine whether Alleghany had a basis for carrier status under 5(3) until it determined under 5(7) "such action as may be necessary * * * to prevent continuance of such violation". If that action included divestment of the illegally acquired stock or sterlization of its voting rights, Alleghany would have no basis for 5(3) status. Obviously fair and orderly administration of the statute required determination of the 5(7) issue first before other person's rights under the Investment Company Act are cut off or otherwise invaded.

Investment Company Act, and the I. C. C. jurisdiction over Alleghany under §5(7) and (8) only attached after the completion of the acquisition. Thus to give Alleghany's management a retroactive immunity from its own violations of the former act by granting it 5(3) status as a carrier would hardly be "consistent with the public interest" or be "just and reasonable." The Commission's view would convert the regulatory obligation imposed by section 5(3) into a benefit to malefactors.

The failure of the controlling non-carrier to make an application to acquire control in the *Marshall Transport* case, 322 U. S. 31 (1943), was held by this court to require dismissal of an application by a carrier subsidiary to acquire control of a second carrier. This court stated two separate grounds for its holding. The first was:

> "As appellees' application to the Commission involved the *acquisition* of non-carrier control of Marshall by Union, Union was a person seeking authority for such control and as such was required by §5(2)(b) to make application to the Commission" (p. 41) (our emphasis).

The second ground was:

> "To approve the transaction involving such non-carrier control without the application of the non-carrier would be to authorize Union's non-carrier control of Marshall without subjecting the former to the Commission's jurisdiction as required by §5(3)" (pp. 41-42).[22]

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[22] *Marshall* is thus an express repudiation of the doctrine adopted in the report herein of the full Commission. (See United States' br., pp. 28-30, 35-36). We think it clear that this court did not intend that a control can be acquired in violation of the Act and then cured at some indefinite time, possibly years later merely by the non-carrier joining in an application to permit an "internal rearrangement of corporate structure." (I. C. C. brief, p. 31.)

This court then went on to hold:

> "The Commission rightly concluded that it was without authority to approve such control unless Union, the non-carrier, filed its application with the Commission, and since Union failed to do so within the time allowed by the Commission's order, the Commission properly dismissed the pending application in which Union had failed to join" (p. 42).

This court did not find that the I. C. C. should have first approved Union's acquisition of control and then subjected the controlling non-carrier to punitive proceedings under 5(7) and (8). Instead it upheld the I. C. C.'s dismissal of the application, and reversed the District Court's annulment of the I. C. C. order. Similar considerations of public policy and Congressional intent required the dismissal of Alleghany's application herein and justified the District Court's annulment of the status and preferred stock orders when the Commission declined so to do.

POINT IV.

The I. C. C. order subjecting Alleghany to its jurisdiction under section 5(3) was made in violation of the Interstate Commerce Act.

Section 5(3) only applies "Whenever a person, which is not a carrier is authorized, by an order entered under paragraph (2) to acquire control of any carrier or two or more carriers."[1]

Assuming, arguendo, that Alleghany does have control of Central, it did not "acquire control of any carrier" by

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[1] The full text of Sections 5(2) and (3) is set forth in the I. C. C. brief at pp. 79-83.

the Big Four-Bridge Company "merger" and lease "modification", nor by the Boston & Albany transactions. It already had 100% control of the Bridge Company, and the Big Four and Boston & Albany Companies are not "carriers" but "lessors". As the District Court found:

> "Here the Commission would escape any responsibility as to the acquisition of the Central by Alleghany and focus public attention only upon the merger of the Louisville and Jeffersonville Bridge & Railroad Company into the Big Four, all the while trying to keep regulatory control of Alleghany and thus preclude any consideration of the matter by the S. E. C. The undesirable consequences of the Commission's double misinterpretation of section 5 thus become all the more pointed." (R. 619).
>
> "The effect of the Commission's position is that whenever a holding company in the position of Alleghany deems it desirable to bring itself within the class 'considered as a carrier' it needs only to join with its subsidiaries in applying to the I. C. C. for approval of some transaction such as the merger of a railroad bridge company into one of the subsidiary railroad companies. Such a transaction, as, indeed, the transaction here, is completely without significance so far as concerns the question whether the issuance of securities of the top corporation is subject to the jurisdiction of the I. C. C. or the S. E. C. The prayer for approval of the merger is treated as if it were an effective but meaningless incantation to propitiate a medicine man." (R. 616).

A. The I. C. C. findings did not authorize Alleghany "to acquire control" of any carrier.

Division 4 found that:

> "The capital stock of Jeffersonville is owned by Big Four, and held by Central under lease." (R. 419); the Big Four "was an operating carrier until

February 1, 1930, since which time Central has operated it as lessee under an agreement of January 2, 1930, authorized pursuant to conditions contained in *New York Central Unification, supra.* Central owns * * * 98.98 percent of the common, and 86.45 percent of the preferred stock outstanding." of the Big Four (R. 417); "In consideration for the transfer of the railroads, properties, interests, rights, privileges, and franchises (except the franchise to be a Kentucky corporation), the Big Four will assume the contracts, deeds, obligations, liabilities, and duties of Jeffersonville, and the shares and certificates of its capital stock will be canceled." (R. 436); "No securities are to be acquired by any of the applicants in consummating the proposed transaction, and the capitalization of the Big Four will not be affected." (R. 436); "The properties of Jeffersonville, after the merger, will be operated by Central as part of the owned lines of railroad of Big Four, under the after-acquired property provisions of an existing lease." (R. 437); "The property of Jeffersonville is not encumbered by any mortgage or similar indenture." (R. 438).[2]

It is thus clear that other than the disappearance of Jeffersonville as a corporate entity, there was no substantial change in the existing distribution of control of the Bridge Company's properties. All that was "authorized" was the substitution of these properties

> "in the *res* of the lease of January 2, 1930, as supplemented. * * * In consideration for the inclusion of the affected properties, the supplement provides that Central will release to Big Four all its interest

[2] The full Commission did not add to or change these findings in its Report on Reconsideration (R. 506), and merely stated "The details of the transactions and descriptions of the properties of the various companies were shown in the Report of Division 4." (R. 514).

in the shares of stock of Jeffersonville, so that they may be cancelled." (R. 440).

There was no finding either by Division 4 or by the full ICC that any of the transactions approved constitute an acquisition of control.[3]

B. The I. C. C. order asserting jurisdiction over Alleghany fails to comply with Section 5(3). It merely approves a "continuation of control", and does not authorize Alleghany "to acquire control of any carrier or of two or more carriers."

Section 5(3) only applies "Whenever a person, which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers." The jurisdictional order (R. 446-448) was made by Division 4 and affirmed without change by the full Commission (R. 516-517). The text of the order discloses that "(a) merger of the properties and franchises" of the Bridge Company into Big Four "for ownership, management, and operation, and through the ownership of stock of the latter company, continuation of control of the properties and franchises" of the Bridge Company by Central and Alleghany, "and (b) modification of the lease * * * to give effect to the merger described in (a) above" were the only acts "approved and authorized" by the I. C. C. (R. 446-447).

Thus the I. C. C. order "entered under paragraph (2)" was not the order which is statutorily mandatory under 5(3) to invest a non-carrier with carrier status.

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[3] "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *S. E. C.* v. *Chenery Corp.* (1943), 318 U. S. 80, 87-8.

"Recently the court has repelled the suggestion that lack of express findings by an administrative agency may be supplied by implication." *Atchison, Topeka, & Santa Fe Railway Company, et al.* v. *United States of America* (1935), 295 U. S. 193, 201.

C. Neither Central nor Alleghany could, as a matter of law, "acquire control" of the Bridge Company properties by the transactions herein since both before and after the transactions the Big Four owned and Central controlled 100% of the Bridge Company's properties.[4]

Appellees assume here, *arguendo*, that as I. C. C. contends, "the proposal to merge the Bridge Company into Big Four was a transaction which required the approval" of the I. C. C. under the first clause of Section 5(2)(a)(i)[5] (I. C. C. br. p. 23). Similarly, appellees assume here, *arguendo*, that as I. C. C. contends "The companion proposal for a lease of the properties of the Bridge Company by Big Four to New York Central was a transaction" for which approval under the second clause of 5(2)(a)(i) was

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[4] The Big Four is not a "carrier" but a "lessor." This point is argued on the assumption that the distinction is of no import, but as we will show in the next point it is destructive of Alleghany's claim to have acquired control of a "carrier" by the lease "modification" and "merger".

[5] For convenience, we print, as follows, the provisions of 5(2)(a)(i) in separate clauses, assigning each clause a Roman number:

> "It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—
>
> "(I) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or
>
> "(II) for any carrier, or two or more carriers, jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or
>
> "(III) for any carrier, or two or more carriers, jointly, to acquire control of another through ownership of its stock or otherwise; or
>
> "(IV) for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or
>
> "(V) for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise." (R. 652, 653).

required (*Id.*). It does not follow that Alleghany or Central, thereby acted "to acquire control" of the Bridge Company pursuant to the third, fourth or fifth clause of 5(2)(a)(i).[6]

As shown at pp. 84-86, *supra*, both before and after the transactions the Big Four owned and the Central controlled 100% of the Bridge Company's properties.[7] There can only be an acquisition of control when a person owning or controlling less than 100% adds by the 5(2) order to that person's prior ownership or control[8] or having no legal or actual ownership or control acquires by the 5(2) order some degree of ownership or control.[9]

In *none* of the "acquisition of control" cases cited by the I. C. C. and Alleghany did either the courts or the I. C. C. find that there was an acquisition of control by a single corporation which, prior to the approved transac-

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[6] New York Central, both before and after the merger and lease, had a 98.98% common and 86.45% preferred stock control of Big Four (R. 417). Clause three of Section 5(2)(a)(i) authorizes "any carrier * * * * to acquire control of another through ownership of its stock or otherwise." Since it already had control of the Bridge Company through stock control of the Big Four and the existing lease, the change "in the *res* of the lease" (R. 440) merely to substitute 100% of the Bridge Company properties for 100% of the Bridge Company stock did not constitute an act "to acquire control."

[7] The "merger", and the "modification" of the "lease", were authorized by the first and second clauses of Sec. 5(2)(a)(i) which are the non-control clauses.

[8] This is what occurred in *Union Belt Ry. of Oakland Control*, (1948) 271 I. C. C. 223; in *New York Central Securities Co. v. United States*, (1932) 287 U. S. 12 the previously uncontrolled interests of minority stockholders were transformed so that they involuntarily became lessors. Central thus acquired from them rights as lessee which increased the degree of its control.

[9] This is what occurred in *United States* v. *Marshall Transport Co.*, (1944) 322 U. S. 31, where the properties of a second carrier wholly outside the system were purchased; and in *C & O Ry. Co. Purchase*, (1945) 261 I. C. C. 239, where Alleghany, having no prior lawful control of the C & O System was permitted to acquire such control.

tion, already directly owned *and* controlled 100% of the company and its properties[10] (I. C. C. br. pp. 24, 26-38). (Alleghany br. pp. 61-71).

Appellants misstate the 1945 C & O case.

Chesapeake & Ohio Ry Co. Purchase, (1945) 261 I. C. C., 239, involved two transactions, as the order therein reflects (R. 183). The first involved the merger into the C & O of the 100% owned Norfolk Terminal Co. properties, but this was approved under the first clause of 5(2)(a)(i), which is the merger clause and not one of the control clauses. As the order shows, Alleghany was not deemed to have acquired "control" of Norfolk Terminal by virtue of the merger, and there is no authorization or approval in the order so stating. The second transaction was Alleghany's "acquisition of control, through ownership of stock" of the C. & O. System carriers (R. 184). This was authorized under the fourth clause. This is the only part of the order where any "acquisition of control" is authorized.[11]

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[10] By "acquisition of control" cases we mean cases decided on the basis of the third, fourth or fifth clauses of Sec. 5(2)(a)(i). The "merger" and non-acquisition of control cases cited by the ICC and Alleghany were all decided on the basis of the first two clauses. Neither appellant makes this distinction clear.

[11] Both Alleghany and ICC continuously misrepresent this proceeding as being a parallel and precedent for the present case. In 1945 Alleghany stipulated that 5(3) status should exist "only so long as such control of C & O continues." See 261 ICC at 241. As above shown, the 1945 order authorized in specific terms an "acquisition of control" of the C & O System; and it was this "acquisition", not the terminal company "merger" that was the basis of the 5(3) "acquisition of control" order. See the District Court's discussion (R. 665-6). Here there is no application for "acquisition of control" of the Central System and the "merger" order alone is the basis for the 5(3) order, an *unprecedented* application of the statute. Yet Alleghany's brief (p. 68) terms the 1945 proceeding "substantially identical with the *Bridge Company* case."

D. Alleghany did not acquire control of any "carrier" by virtue of its application herein, or by virtue of the Boston and Albany proceedings, since both the Big Four and the companies in the Boston and Albany proceeding are statutory "lessors", not "carriers".[11a]

The application in the Bridge Company proceeding states that it is made by "The Big Four, as *lessor,* and The New York Central Railroad Company, as lessee" (R. 211); and "that prior to February 1, 1930, the Big Four was an operating carrier and from and after that date it has been a lessor company" (R. 215). Division 4 recognized Big Four "as lessor and Central as lessee" in its decision (R. 440).

In their application in the Boston and Albany proceeding, Central and Alleghany described the 3 companies whose "control" was to be acquired, namely the Boston and Albany Railroad Co., the Pittsfield & North Adams Railroad Corporation, and the Ware River Railroad Company (R. 566) as "lessor companies" (R. 577). Division 4 recognized this definition in its report (R. 454, 462, 464-5). At R. 465, it refers to "the three lessor companies".

Section 5(3) status applies *only* "Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any *carrier* or of two or more *carriers*". (Emphasis added).

Section 5(13) states "As used in paragraphs (2) to (12), inclusive, the term 'carrier' means a carrier by railroad and an express company, subject to this part," *i.e.* Part I of the Interstate Commerce Act. This section was added by the Transportation Act of 1940, 54 Stat. 909. Section 1(3)(a), second sentence, states "Whenever the word 'carrier' is used in this part it shall be held to mean 'common carrier' ". A common carrier has the duty under Section 1(4) "to provide and furnish transportation • • •

[11a] This issue was not before the District Court.

and to establish reasonable through routes with other such carriers and just and reasonable rates.'"[14] By both I. C. C. and judicial determination after passage of the 1940 Act, a "lessor" is not a "carrier", since under the statutory scheme it does not provide and furnish transportation and establish rates.[15] Thus neither Alleghany nor Central acquired control of any "carrier" by virtue of the Big Four and Boston & Albany applications.[16]

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[14] The stocks of the Boston & Albany, Pittsfield, and Ware Companies acquired by Central are simply stocks in companies all of whose transportation properties have been leased since November 15, 1899, November 25, 1876 and January 1, 1874 respectively, to Central for 99 to 999 years (R. 454). None of these companies nor Big Four is a "common carrier" nor a "carrier by railroad".

Section 20(8) of the Act distinguishes between "carrier" and "lessor", "as used in this section", that is Section 20, which is the only section to whose provisions a non-carrier invested with carrier status under 5(3) is made subject (aside from sections of Part II and III applicable to motor and water carriers), except Section 20a, paragraph (1) of which subjects to its provisions only "a common carrier by railroad • • • which is subject to this chapter, or any corporation organized for the purpose of engaging in transportation by railroad subject to this chapter" (Part I).

[15] The I. C. C. and judicial cases are summarized in *Group of Boston & Providence R. R. Corp. Stockholders* v. *I. C. C.*, (1955 D. C. Va.) 133 F. Supp. 488, at 494, affirmed (1956) 350 U. S. 926, which held on the basis of case law applying to the New York Central-Big Four Companies that the Boston & Providence Railroad Co. (B&P) was a "lessor" company and therefore not a "carrier" within the meaning of Part I of the Act.

[16] Central's pre-existing control of the Bridge Company existed only by virtue of the Central's lessee relationship to the Big Four as "lessor". The "merger" has not changed that relationship, nor has the "modification" of the lease. Instead of controlling the Bridge Company by reason of "the capital stock • • • owned by Big Four, and held by Central under lease" (R. 419), Central will control it by reason of the substitution of the Bridge Company's properties "in the *res* of the lease" (R. 440). And, even assuming Big Four was a "carrier", all that was required to consummate these transactions was as previously noted the authority of the I. C. C. under the first and second clauses of 5(2)(a)(i), which are the "merger" and "lease" clauses, as distinct from the three "control" clauses.

Since the I. C. C. has no jurisdiction under Section 5(2)(a)(i) to approve acquisitions of control of "lessors"[17], the applications thereunder should have been dismissed.

E. Young and Kirby, as controlling persons, were "necessary parties" to Alleghany's application, and under the Marshall Case, 322 U. S. 31, their non-joinder required its dismissal.

Application by only one of three controlling persons is obviously insufficient within the meaning of the statute. Section 1(3)(b) defines control in such a way as:

> "to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers or stockholders, a voting trust or trusts, a holding or investment company or companies or through or by any other direct or indirect means;"

Clearly, Young and Kirby are dominant stockholders, directors, and officers of New York Central by virtue of their 400,000-share personal ownership, their Board positions, Young's Chairmanship and their control of Alleghany and of its investment in New York Central stock. The record also shows that the Central board was "Young-selected" (R. 42, 539). Thus, Young and Kirby control Central by various means mentioned in 1(3)(b): by "organization" of the slate of nominees, as "common directors, officers" and "stockholders" of Central and Alleghany and by use of "a holding company or investment company". The record shows that as of January 31, 1955, Mr. and Mrs. Robert R. Young owned 9.7% and 48.9%, respectively, of the Prior Preferred Stock of Alleghany Corporation, or a total of 58.7%. This stock elects two of

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[17] "Lessors" are regulated under Sec. 20 of the Act.

Alleghany's eight directors. The Youngs and Kirby together also were the owners of 8.1%, 2.7% and 9.5%, respectively, of Series "A" Preferred Stock, or a combined total of 20.3%, which also elects two directors, and Young and Kirby own 0.7% and 11.1% of the common stock of Alleghany, or a total of 11.8% of said stock, which elects four directors (R. 362-3, 348-9).

By virtue of the foregoing holdings and Kirby's and Young's positions as President and Chairman, it is obvious that appellees' undenied allegation before the I. C. C. of the control of Alleghany by Young and Kirby (R. 539, 323), needed no additional support.

Division 4 found:

> "As a consequence, a holding company *and those in control thereof,* admittedly acquired control of a carrier which controls subsidiary carriers. In our opinion the Congress sought to prohibit that type of acquisition of control, unless approved and authorized by us upon consideration of an application, and upon our finding that the proposal would be consistent with the public interest" (R. 426). (Emphasis supplied.)

The full Commission found:

> "The contention that Alleghany does not control the individual directors on Central's board ignores the realities of the situation. Alleghany *and its allied interests* have succeeded in electing sufficient members of the board to permit them to organize and elect their own officers. Clearly the tenure in office of such directors as permitted this action depends upon their conformance to the views of the stockholders who elected them" (R. 513). (Emphasis supplied.)

The District Court, on the basis of the above finding, said:

> "The position taken by the plaintiffs throughout has been that Alleghany was but an instrument employed by the Young-Kirby-Murchison group in the control of the New York Central and was in no sense in control. It is to be observed that the findings of neither Division 4 nor the I. C. C. meet this issue squarely.
>
> We are forced, therefore to the conclusion that the findings do no more than say that Alleghany, with someone else, controls New York Central. They do not even say whether the someone else, alone, has control. Does that satisfy the statute?" (R. 624).

It was this Court that in the *Marshall Transport* case affirmed the I. C. C.'s holding that a controlling non-carrier is a necessary party to a 5(2)(a) application. In the present case the full I. C. C. summarized that doctrine and its application as follows:

> "The subsequent filing by Alleghany of its application in these proceedings for approval of a rearrangement of the corporate structure of Central and its subsidiaries was pursuant to and consistent with the decision of the United States Supreme Court in *United States* v. *Marshall Transport Co.*, 322 U. S. 31, which held that the controlling person was a necessary party in proceedings for approval of acquisition of the properties of a motor carrier subject to the act by a motor carrier controlled by a person not a carrier" (R. 514).

Yet at no point did the I. C. C. consider appellees' contention and offer to prove, if any denial were made, that Young and Kirby control Alleghany and did not join in its jurisdictional application therein, although they were necessary parties under the doctrine of *United States* v. *Marshall Transport Co.* (1944) 322 U. S. 31 (R. 539). Thus, even assuming without admitting that Alleghany controls

Central, the Commission had no jurisdiction over Alleghany and was without power to approve the application.

Under *Marshall,* the I. C. C. is required to dismiss an acquisition of control application when there is non-joinder of all of the controlling persons.[18]

The I. C. C. found in 1948 that "Applicant Young and his associates control the policies of both Alleghany and the Chesapeake & Ohio." *Chesapeake & Ohio Railway Purchase* 271 I. C. C. at p. 14.

In *Standard Freight Lines, Inc.-Merger* (1944), 40 M. C. C. 41, the I. C. C. held that Chaddick, an individual, acquired control and was therefore a necessary party to a proceeding for approval of a merger between two subsidiaries, both already controlled by him through stock ownership.

In *Arkansas & L. M. Ry. Co. et al. Control* (1952), 282 I. C. C., 254, the individuals who, by a voting trust, controlled the acquiring corporation were also held to be in indirect control of the four carriers acquired by the corporation and therefore approval of the individuals' acquisition of their control was held necessary (p. 263).[19]

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[18] In 1944 when the I. C. C. charged there had been an illegal acquisition of control of Chesapeake & Ohio by Alleghany, Young and Kirby, all three were named as respondents. See Examiner's Proposed Report, in Docket No. 29085, filed March 6, 1945, and 261 I. C. C. at 240.

[19] At the oral argument on final hearing counsel for Alleghany made the following admission:

> "Judge Frank: * * * I gather you say this, that if it were true, and the evidence shows unmistakably that Kirby and Young, together with Alleghany, all three, were in control, one of these individuals would be the necessary party.
>
> "Mr. Wheeler: I agree if you consider Young, Alleghany and Kirby on this level, not if you try to reach them through Alleghany." (R. 149).

Appellees contend that even if Young and Kirby had no relationship to Alleghany as officers or directors or controlling stockholders, they are two of three controlling persons under the I. C. C. findings since they were the "allied interests" referred to in the full Commission's report, i.e., "allied" to obtain control of Central.

The statute makes no distinction between individuals and corporations as controlling persons. In fact, the last sentence of Section 1(3)(a) and the text of Section 1(3)(b) makes clear that, for the purpose of Section 5(2)(a)(i), no such distinction shall be made in determining whether "a person which is not a carrier" is an individual or a corporate person. The 1940 Act substituted "person" for "corporation". (see p. 70 this brief) thereby making unmistakable Congress' intention to include individuals. It is thus clear that "the necessary party" doctrine obviously extends to Young and Kirby.

On the above facts which necessarily must be conceded, the Commission erred in not dismissing Alleghany's application for non-joinder of Young and Kirby as necessary parties.

POINT V.

If the I. C. C.'s orders are not void for the reasons set forth in Points II, III and IV, they are invalid because appellees were denied a hearing.

We have shown above that the record facts conclusively establish that Alleghany did not control Central; that the I. C. C. had no jurisdiction over this proceeding because Alleghany refused to make a control application and because there was no acquisition of carrier control by reason of the merger application under Section 5(2) as a matter of law. By themselves these considerations establish the Commission's lack of jurisdiction and the nullity of its orders. If anything further be needed to strike them down, the Commission's failure to accord appellees a hearing accomplishes that result.

Early in 1955, while the I. C. C. had before it the applications for the orders which are the subject of this liti-

gation, appellees made timely application to intervene and be heard (R. 317, 392, 448, 478, 489, 537). Their petitions demonstrated a direct interest in the proceedings by showing that they were common stockholders of Alleghany, that the assertion of I. C. C. jurisdiction would deprive them of the benefits and protection of the Investment Company Act and S. E. C. regulation thereunder, and that the proposed preferred stock issue was unfair and otherwise improper, as the S. E. C. subsequently found after a full evidentiary hearing.

Under Section 5(2)(b) of the Interstate Commerce Act it is mandatory for the Commission to grant interested parties a hearing. The pertinent portion of the statute declares

> "Whenever a transaction is proposed under subparagraph (a) * * * the Commission * * * shall afford reasonable opportunity for interested parties to be heard."

It is true that the Commission is not required to set every case down for a public hearing at which any person, whether interested or not, may attend or testify. Such a time-consuming procedure was found by Congress to be unnecessary to safeguard the public interest so long as all interested parties were heard. Congress, therefore, provided that the I. C. C. might use its discretion in determining whether to afford a *public* hearing but in so providing Congress did not amend that portion of the statute making mandatory a hearing for interested parties.

Appellants have sought to avoid the logic of Section 5 by two equally unsound contentions. First, they argue that the statute should not be read to grant interested parties a hearing. Second, placing little confidence in their first contention, they insist that appellees had no interest in

these proceedings because their financial investment was small in comparison to that of those who favored the order. The short answer is that the statute must be read as making a hearing necessary because any other interpretation would render it unconstitutional as permitting deprivation of property without due process of law, and that the due process requirement of the Constitution applies equally to the smallest as well as to the greatest in the land. *Morgan* v. *United States,* (1938) 304 U. S. 1, 14, 15, 18, 19, 21, 22, petition for rehearing (*Id.*); *Morgan* v. *United States,* 298 U. S. 468, 477, 478 (1936); *Wong Yang Sung* v. *McGrath,* (1950) 339 U. S. 33; *Baltimore & Ohio Railroad Company* v. *United States,* (1936) 298 U. S. 349, 368, 369; *United States* v. *Abilene & Southern Railway Company,* (1924) 265 U. S. 274; *Chicago Junction* case, (1924) 264 U. S. 258; *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.,* (1913) 227 U. S. 88.

To make matters worse the Commission permitted appellees to intervene as interested parties but only at the very time it denied them a hearing (R. 517, 519, 536). Although made a month earlier, appellees did not even learn of the order granting them interested parties status and dated April 20, 1955 until one day *after* their application for a hearing was denied (R. 519, 539-540).[1] At no time were they given notice of or an opportunity to be heard with respect to Alleghany's application in The Boston & Albany docket (R. 565).[2]

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[1] The denial of appellees request for a hearing in the very order which granted intervention effectively cancelled out their rights as intervenors. Appellees were left with no remedy other than to apply for reconsideration. Their right to be heard orally, to adduce evidence and to cross examine Alleghany's officers died aborning.

[2] The order on this application constitutes no basis for carrier status by Alleghany for other reasons also, as the District Court found (R. 675-678).

Appellees had offered to prove that Alleghany in fact did not control Central (R. 538, 539), a fact which, if established, all agree would have negated the Commission's jurisdiction. The rejection of this offer by denial of a hearing was another instance of the denial of due process. *National Labor Relations Board* v. *Burns,* (1953, CA 8th), 207 F. 2d 434, 436.

Appellees request for a hearing and argument had been repeatedly and unequivocally made (R. 318, 319, 324, 403, 480, 491, 492, 540, 543). The lack of due process and appellees rights under the Administrative Procedure Act were specifically raised (R. 539, 540).

Although appellees by their pleadings had repeatedly tendered for adjudication the crucial question of where, in whom, and to what extent control of Central reposed (R. 269-281, 317-324, 392-410, 448-449), never once were they permitted to argue orally or to present their evidence or to swear or cross-examine witnesses in accordance with judicially established criteria of a full hearing. *Akron, Canton & Youngstown Railway Co.* v. *United States,* (1923) 261 U. S. 184, 200; *Southern Stevedoring Co.* v. *Voris,* (1951 CA 5th) 190 F. 2d 275 and cases cited.

Summarizing: What the Commission did in this case was to deny summarily and without a hearing all of appellees' requests for a hearing and their offers of proof, and to withhold granting their applications to intervene until it was ready to render a final decision. Twice, on the very day it made its decisions, it admitted appellees as interested parties after there was no longer any opportunity for them to assert or even to claim the litigating rights which were theirs under elementary concepts of fair play and the applicable provisions of the Administrative Procedure Act. A more complete denial of due process in an administrative hearing is difficult to imagine.

Both the Alleghany and Commission briefs argue that appellees actually received a hearing in the sense that the Commission received their pleadings, motions and applications for reconsideration, and that they were entitled to nothing more. For the proposition that such a "hearing" if, by any stretch of the imagination it can be called one, satisfied the requirements of due process none of the appellants cite any judicial precedent.[3]

Alleghany goes so far as to urge (br., p. 90) that "One has had a reasonable opportunity to be heard under §5 where he has received proper notice of a pending proceeding before the I. C. C. whether or not such proceeding takes the form of a hearing.", a contention which the Commission seems unwilling to sponsor.[4]

Such an interpretation violates the provisions of the Administrative Procedure Act (60 Stat. 237, Ch. 324; 5

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[3] On the contrary, such a concept of a hearing is inconsistent with the elaborate hearing procedures prescribed by the Commission's own Rules of Practice. [Rules 5(j), (k), 44, 44(b), 45(b), 50, 74-84, 86-90, 101.]

[4] The two I. C. C. Motor carrier cases cited at pages 90-91 of the Alleghany brief do not support this proposition. In both cases all parties were accorded plenary hearings. In *People* v. *Oskroba* (1953 Ct. App. N. Y.), 305 N. Y. 113, 117 the New York Court of Appeals construed "opportunity to be heard" as the equivalent of notice plus "an opportunity to attack or deny the charge", a right which appellees were never accorded in this case.

The argument that the words "opportunity * * * to be heard" appearing in Section 5(2)(b) are the equivalent of mere notice of hearing, ignores the words "the Commission shall notify * * *" appearing in the earlier portion of the same sentence. If both phrases mean the same thing, as appellants contend, the second would be mere surplusage, a view which would violate the elementary rule of statutory construction that, if possible, all parts of a statute are to be given effect and that none is to be ignored. *United States* v. *Menasche* (1955), 348 U. S. 528, 538-9; *Montclair* v. *Ramsdell* (1883), 107 U. S. 147; *Washington Market Co.* v. *Hoffman* (1879), 101 U. S. 112.

The case of *FCC* v. *WJR The Goodwill Station*, cited at p. 90 of Alleghany's brief is adequately distinguished by the Court below (R. 671).

U. S. C. Sec. 1001, *et seq.*) which are applicable to proceedings before the I. C. C. *Coyle Lines, Inc.* v. *United States,* (D. C. La. 1953) 115 F. Supp. 272; *Riss & Co. Inc.* v. *United States,* (1951) 341 U. S. 907; *Acme Fast Freight* v. *United States,* (D. C. Del. 1953) 116 F. Supp. 97; *Pacific Inland Tariff Bureau* v. *United States,* (D. C. Or. 1955) 129 F. Supp. 472.

From the moment the Commission "treated" appellees as parties (R. 517) they became such [5 U. S. C. 1001(b)]. Thenceforth they were entitled to the protections of the Administrative Procedure Act, including, of course, the most fundamental right of a litigant, to have a hearing [5 U. S. C. Sec. 1006(c)].

Whether one denominates such a hearing as "evidentiary" is immaterial for the statute provides:

> "Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Appellants argue that the Act is inapplicable to the case at bar because the hearing procedures mandated by the Act are applicable only in cases "required by statute to be determined on the record after opportunity for an agency hearing" (5 U. S. C. Sec. 1004), and Section 5(2)(b) of the Interstate Commerce Act makes the granting of a hearing discretionary with the Commission. The same argument was rejected by this court in *Wong Yang Sung* v. *McGrath,* (1950) 339 U. S. 33, 49.

Appellants' argument that the Act of August 2, 1949 (63 Stat. 485) followed a Commission request to relieve it of the necessity for holding public hearings in all cases where "carriers by railroad are involved" does not meet the

holding of the court below that there can be a non-public hearing under Sec. 5(2)(b) at which interested parties must have a reasonable opportunity to be heard (R. 671). The shortened or modified procedure rules[5] contemplate a kind of hearing which is clearly non-public in character.

In any event Alleghany is a "non-carrier", and The Big Four and the companies in the Boston & Albany proceeding are "lessors", not "carriers by railroad." At the most the I. C. C.'s discretion applies only to Central's and the Bridge Company's applications. To interpret 5(2)(b)'s discretionary clause so as to allow a non-carrier such as Alleghany to obtain the benefit of it was clearly not within the Congressional intent. Appellants' citations of legislative history uphold this view. Admittedly the discretion was to be applied only "Where such cases are of minor importance, (and) the mandatory requirement causes unnecessary expense and delay" (I. C. C. br., p. 71). A case involving 48 million dollars of securities is hardly one "of minor importance". Nor is it true that appellees made "unsupported representation(s)" to the I. C. C. Their pleadings supplied documentary evidence from Alleghany's own files in the form of the proxy statement showing the individuals' personal holdings in Central and the representations made in connection therewith (R. 405-410), and their amended pleadings rebutting Alleghany's allegations were supported by affidavits (R. 492; Unprinted Record, p. 2327; R. 538-539, 540-541, 543; Unprinted Record, p. 2545). Yet I. C. C. characterizes "appellees" pleadings as "shifting and uncertain" (pp. 71, fn. 18, 72), merely because one appellee (Breswick) amended its February 4, 1955 pleading on February 18, 1955 to conform to the evidence discovered in the interim (R. 394-396).

Assuming, *arguendo* that a proper construction of Section 5(2)(b) authorized the Commission's finding that the

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[5] Commission Rules of Civil Procedure Nos. 5(j), 5(k), 44-54.

public interest did not require that appellees be given *any* hearing (R. 416), this finding was an abuse of discretion reviewable by the District Court under the Administrative Procedure Act [U. S. C. 1009(e)].

The nature and degree of control of New York Central exercised or exercisable by Young, Kirby and the other non-Alleghany directors of Central in their individual capacities, had been placed in issue by appellees' pleadings (R. 322, 323, 392-396, 491, 538-539, 670) and was obviously a very material fact. If resolved against Alleghany, it destroyed the basis of the Commission's jurisdiction. As such it was an issue directly affecting the public interest.

The Commission's finding of exclusive Alleghany (vis-a-vis Young and Kirby) control of Central was based not upon admissions in the pleadings, for the question of exclusive control of Central by Alleghany was always in issue (R. 670). Nor was it based upon evidence because none was adduced, no hearings having been had and, under Rule 19 of the Commission's Rules of Practice, Alleghany's controverted sworn pleadings not having the status of evidence.[6] Appellees specifically asked that the two applications be tested by sworn testimony subject to cross-examination (R. 403, 491, 538-539).

To the extent that the Commission found Alleghany control of Central by taking judicial notice of "the realities of the situation" (R. 513) or by examining the pages of the New York Times (ICC br., p. 67, fn. 14) the Commission exceeded its powers. Although the Commission might have taken judicial notice of a change in Central's

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[6] "Rule 19. *Pleadings part of record.*

"Recitals of material and relevant facts in a pleading filed prior to oral hearing in any proceeding, *unless specifically denied in a counterpleading filed* under these rules shall constitute evidence and be a part of the record without special admission or incorporation therein, but if request is seasonably made, a competent witness must be made available for cross examination on the evidence so included in the record." (Emphasis ours.)

management as a matter of public knowledge, it could not judicially notice the nature and extent of the new control and the names of the persons in whom it reposed. *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio* (1937), 301 U. S. 292, 302. Agency findings cannot be based on hearsay alone. There must be a residuum of legal evidence. *National Labor Relations Board* v. *Amalgamated Meat Cutters & Butcher Workers of North America,* (1953 C. A. 9th) 202 F. 2d 671. And the findings must be based on "the record as a whole". *Universal Camera Corp.* v. *N. L. R. B.,* 340 U. S. 474.

Where administrative action is taken in an adversary proceeding without an adequate opportunity to defend, basic constitutional rights are invaded. *United States* v. *Wood,* (1945 D. C. Mass.) 61 F. Supp. 175, 179; *Green Spring Dairy Inc.* v. *Commissioner of Internal Revenue,* (1954 CA 4th) 208 F. 2d 471. Such agency action constitutes an abuse of discretion reviewable by the District Court even if the action taken were one committed by law to agency discretion. *Mastrapasqua* v. *Shaughnessy,* (1950 CA 2nd), 180 F. 2d 999, 1002.[7]

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[7] In *O. C. Wiley & Sons* v. *United States* (1949 DC Va.), 85 F. Supp. 542, 545, cited by the appellants as authority for the proposition that the Commission has discretionary power to dispense with a hearing, the court observed that Wiley, who sought to review an I. C. C. order granting certain operating rights to another entered under Section 5(2)(a)(i) of the Interstate Commerce Act, had actually failed to protest the challenged transfer as one not authorized by that section, and apparently had neither sought nor obtained the right to intervene in the proceeding before the Commission. For these and other reasons set forth in the opinion unrelated to the matters in controversy here, the statutory court there held that no adequate showing had been made to justify interference with the exercise by the Commission of its discretion. Since Wiley had failed to exhaust or even to exercise his administrative remedies and had elected, instead, to have his rights adjudicated in the Virginia State Courts, the Court's holding that Wiley's right to a hearing was a matter primarily vested in the sound discretion of the Commission was dictum.

Finally, had a hearing been granted in the preferred stock docket, it would not have been necessary to issue the injunction against the issuance and distribution of the stock. Presumably, upon such a hearing, the facts which induced the S. E. C. to find that the Plan was "grossly unfair" to the common stockholders (SEC Investment Company Act Release No. 2446, November 30, 1956, pp. 14, 23, 25) and that the long-term conversion right of the new preferred stock introduced "complicating, and undesirable features" into the Alleghany corporate structure (*Id.*, p. 12), and made the new stock so "highly speculative and volatile" as to make it "inappropriate" for Alleghany (*Id.*, p. 24) would have justified and produced an I. C. C. finding to the same effect and the necessarily concommitant finding that the new issue was not compatible with the public interest under Section 20a(2) of the Interstate Commerce Act.

The issues litigated before the S. E. C. were called to the I. C. C.'s attention by appellees (R. 478-480; 537-544). The finding of Division 4 that appellees had "described no evidence which they would produce if a hearing were assigned, and alleged no facts which would justify such assignment" (R. 519), ignored appellees' pleadings.

POINT VI.

The District Court injunction was a proper exercise of its equity powers to prevent 48 million dollars of void and defective securities from passing into the hands of innocent purchasers.

A. The S. E. C., after a full evidentiary hearing, concluded that it could not find legalization of the securities "necessary or appropriate in the public interest or consistent with the protection of investors" and affirmatively found that the New Preferred Stock had "complicating and undesirable features", was "potentially deceptive" to investors and was "grossly unfair" to the Common Stockholders.

For the 20 years prior to the Alleghany board's approval of the exchange plan in December, 1954, the Series A Preferred Stock ranged between a market value as low as $2⅜ and as high as $170 (R. 306). During this period (1934 to December 1, 1954) Young, Mrs. Young and Kirby accumulated 20% of the stock for their own account (R. 309, 522).

"It is also undisputed that shortly before the plan for the issuance of the new stock was announced, defendant Young more than doubled his personal holdings of the old stock to be refunded, increasing them from 5,179 shares to 11,087" (*Breswick* v. *Briggs*, 135 F. Supp. 397, 402-403), out of a total issue outstanding of only 136,744 shares (R. 530). Alleghany's board approved issuance of the new securities on December 28, 1954 (R. 520). By June 15, 1955 —7 days before the final I. C. C. order approving the plan— the 10 new shares to be given for one old share were quoted at $348¾ (p. 109, *infra*), more than double Young and Kirby's cost price (assuming they paid as much as $170, the maximum price from 1934 to December, 1954), and

representing a minimum profit to them on their total holdings of 27,784 old shares of at least $175 per share, or $4,862,000. These profits were their obvious objective when they sought to confront the court below with a *fait accompli*, on June 23, 1955.

The old stock's maximum legal claim, as of the time of Division 4's order approving the plan, was $237 (R. 524). This included $100 par value, $5 redemption premium, $130⅝ in accrued, unpaid dividends to January 31, 1955 (R. 356), and $1⅜ additional arrearages to May 1, 1955. Thus the June 15, 1955 market price guaranteed the holders of the old stock a market value of $111 more than their maximum legal claim, or a total of $15,096,000 in *excess* of 100% of a claim which, immediately prior to formulation of the plan in December, 1954, had sold at a 20-year high of only 72% of that claim, or $170 per share. This was then the manipulation which, except for the orders of both the District Court and the S. E. C., would have been successful and for which this Court's blessing is now sought.

In its Findings and Opinion denying Alleghany and the preferred stockholders an exemption of the new Convertible Preferred Stock from the provisions of the Investment Company Act of 1940, the S. E. C. stated:

> (1) "* * * the controlling feature is the value of the right to purchase common stock and not the preferred stock attributes" (p. 13).
>
> (2) "We think that in the present case the right to purchase common stock, which was purposely made the valuable element in the new preferred stock in order to induce exchanges, so dominates the investment characteristics of the new preferred as to make that stock in substance not a senior security entitled to the exemption provided by Section 18(e)

of the Act but a right to purchase within the meaning of the prohibition of Section 18(d). The real consideration for exchanging the old preferred stock is not the priorities of the new security but its right to purchase common stock, * * *" (p. 14).

(3) "We are of the opinion that under the circumstances presented, particularly the difficulties that would be imposed on investors, both present as well as prospective to whom the safeguards of the statute extend, in evaluating this security were its issuance permitted, and the fact that we are not able to find on the basis of the record before us that the exchange offer falls within the range of fairness, we cannot grant an exemption under the standards of Section 6(c). The speculative nature of the new preferred stock, the difficulty of its evaluation, and our consequent inability to make the necessary findings are demonstrated by the record, particularly the testimony of the two expert witnesses who testified in support of the plan" (p. 14).

(4) "The statutory prohibition against long-term warrants and rights to purchase gives Congressional recognition to the fact that such securities are a speculative medium that introduce complicating and undesirable features into a corporate structure and which may impose serious difficulties upon investors in determining the intrinsic value not only of the warrant or the right to purchase but of all the securities affected, in the corporate structure. A right to purchase common stock can thus confuse investors by the various implications and possibilities which it presents. A convertible security is by its very nature hybrid in character. In the instant case, this hybrid character derives, on the one hand, from the preferred aspects of the stock and, on the other, from the right to purchase common stock." (pp. 12-13).

(5) "Lenz [Alleghany's expert] pointed out that there is no scientific way of computing or estimating

the premium value of a long-term option, and that such an estimate was a matter of judgment on the basis of past experience with other securities. He stated: 'The difficult part, as I see it, is trying to determine just how much of this premium you would generate as a result of this plan and how it could be held within reasonable bounds. That unfortunately goes back to that matter of judgment that we have such difficulty with' " (p. 20).[1]

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[1] The S. E. C. noted the following market history of the old preferred stock beginning with the first day after the issuance of Division 4's order, namely, May 27, 1955, and including the time when the I. C. C. issued its final order on June 23, 1955 affirming that order.

"Closing Price as of	Common Stock	Old Preferred Stock*	Conversion Value of 47 Shares of Common Stock**	Premium Value of 15-Year Non-Callable Right of New Preferred Stock for 47 Shares
May 27	8⅞	277½	240⅞	36⅝
31	9½	292	270¼	21¾
June 1	9⅞	300	287⅞	12⅛
2	10	316	293¾	22¼
3	9⅞	315	287⅞	27⅛
6	9⅞	311	287⅞	23⅛
7	9⅞	326¼	287⅞	38⅜
8	10	340	293¾	46¼
9	10	316¼	293¾	22½
10	10⅛	323¾	299⅝	24⅛
13	10⅛	333¾	299⅝	34⅛
14	10	333¾	293¾	40
15	10	348¾	293¾	55
16	10	346¼	293¾	52½
17	9⅞	340	287⅞	52⅛
20	9⅞	341¼	287⅞	53⅜
21	9⅜	337½	264⅜	73⅛
22	9⅝	338¾	276⅛	62⅝
23	10¾	348¾	329	19¾
24	10½	352½	317¼	35¼

"* Prices are for old preferred stock through June 6, 1955 and for 10 shares of new preferred stock as quoted on a when-issued basis beginning June 7, 1955.

"** After allowance for price of $3.75 per share payable on conversion" (pp. 21-22).

(6) "* * * the 47 shares of common stock obtainable on conversion of the new preferred stock received under the exchange offer would have a net asset value ranging from approximately $217 to $413, depending on the extent of conversions assumed" (pp. 18-19).

(7) "Lenz did not believe that the possibility of ultimate conversion of the new preferred stock, and the consequent diluting effect on asset value, would hold down the market price of the common stock, since such conversions were not a likely prospect for 15 years. In our opinion, this illustrates the potentially deceptive effect on investors of the right to purchase common stock which the new preferred stock represents" (p. 23 fn 23).

(8) "Lenz expressed the view that Alleghany's common stock would continue to sell at a premium over its asset value, as it had at times in the past, so long as that asset value was increasing, and that Alleghany's common stock might be expected to increase to approximately the $12.55 figure after final consummation. On that basis the common stock into which each share of old preferred stock would be ultimately convertible would be in excess of $400, an amount which is considerably above the $270 figure that Lenz recognized as being high in terms of fairness to the existing common stockholders. In our opinion this would appear to produce a grossly unfair result" (p. 23).

In the Matter of Alleghany Corporation, Investment Co. Act Release No. 2446, (November 30, 1956) —— S. E. C. ——.

B. The District Court's injunction was necessary in the public interest and for the protection of the Common Stockholders and third persons to whom the tainted securities might otherwise have been transferred.

When the District Court issued its final injunction the following facts of record were before it, any one of which was sufficient to justify and to require its issuance: (1) The vote of the common stockholders approving the issuance of the new preferred stock had been obtained without a disclosure to them of the $15,000,000 premium above 100% of the legal maximum of the old preferred stock claim which would be received by the preferred stockholders, and without advising the common stockholders of their rights under the Investment Company Act or of the pending Gilbert and S. E. C. petitions before the ICC to protect these rights (R. 190, 269); (2) Young and Kirby had acquired 20% of the old preferred stock, prior to the announcement of the plan; (3) the fact that Young, Kirby, Murchison and Richardson were claiming for themselves all the profits on their 1,000,000 shares of Central stock while at the same time claiming that these same stock holdings invested Alleghany with control of Central and constituted a justification for carrier status under §5(3), and had personally used the resources of Alleghany in their proxy fight in violation of the Investment Company Act but not the Interstate Commerce Act; (4) the deliberate disruption by Alleghany of the *status quo* while the motion for preliminary injunction was *sub judice* in order to present the court with a *fait accompli* in which $48,000,000 of void and defective securities would have been unloaded on an innocent public; (5) the fact that the securities were to be issued pursuant to voided orders of the I. C. C., without

compliance with the condition upon which the stockholders' approval of their creation had been obtained, namely the obtaining of a valid I. C. C. order; (6) that, even assuming the I. C. C. had jurisdiction, it had not been lawfully exercised, no hearing had been held and other rights of the minority stockholders had been ignored or denied; (7) the I. C. C.'s own findings that exercise of the new conversion rights "will at that time have the effect of diluting the rights of the common stockholders" (R. 530); and (8) all of the other basic facts that led to the S. E. C.'s eventual findings that the issuance of the securities was not appropriate or necessary in the public interest nor in the interest of investors and was "grossly unfair" to the common stockholders.

We doubt whether many three-judge statutory courts have had so overwhelming a basis for issuing an injunction as did the court below.

C. The injunction granted by the District Court was consistent with its inherent and residual equity powers under the Urgent Deficiencies Act.

Both the I. C. C. and Alleghany assert that the District Court lacked jurisdiction to enjoin the issuance and further transfer of the new preferred stock and both claim that after the District Court annulled the I. C. C. orders as void "it reached its jurisdictional limit" (Alleghany br., p. 97) and "at that point its authority was exhausted" (I. C. C. br., p. 77). This contention has been explicitly repudiated by this court.

In the *Chicago Junction* case [*Baltimore & Ohio Railroad Co.* v. *United States* (1924), 264 U. S. 258] this court stated (pp. 269-270):

"It is contended that this bill was properly dismissed for want of jurisdiction, at least as to the terminal companies and their stockholders other than the New York Central, because the plaintiffs have joined with the suit to set aside the order, a suit to restore the status quo. The objection is not that the bill is multifarious, or that it is otherwise in conflict with established equity practice. The argument is that the United States is a necessary party; that against it, suit can be brought necessarily and solely under the Act of October 22, 1913, chap. 32, 38 Stat. at L. 219, 220; and that the consent so given does not extend to a suit in which it is sought to set aside both the order and rights acquired by private persons thereunder. There is nothing in the legislation to indicate that Congress intended such a limitation of the scope of the relief to be afforded. The sale of the stock and the lease, which it is sought to set aside, were made immediately after entry of the order; that is, before expiration of the thirty days provided by ¶2 of §15; and before the plaintiffs' petition to set aside or modify the order had been disposed of. To permit the joinder objected to could not prejudice the United States. To prohibit the joinder would, in large measure, defeat the very purpose of the bill, and would clearly prevent that expedition in affording relief which it was the purpose of Congress to insure."

In discussing his opinion in the above case, in *Pittsburgh & West Virginia Railway* v. *United States* (1930), 281 U. S. 479, Mr. Justice Brandeis summarized it as follows:

"The case at bar is wholly unlike Chicago Junction Case . . . where a prayer to set aside the illegal purchase of stock and the lease already made was held proper as ancillary to setting aside the order of

the Commission authorizing the same. There, the joinder was permitted in order to carry out the purpose of Congress to make the judicial review effective" (p. 488).

Appellants' argument ignores the crucial fact that Alleghany went to the extraordinary lengths of disrupting the *status quo* while the case was *sub judice*, thereby compelling the court to resort to its equity powers.[2] Even the preferred stock appellants Gruss *et al.* concede in No. 36 that a three-judge court is not merely a court of limited review but is also a court of equity. (See Gruss brief, pp. 26-7 and cases cited therein.)

In an affidavit dated December 9, 1955 Alleghany counsel David Hartfield, Jr., stated with respect to settlement of the final decree:

> "Accordingly, in the interest of complete candor, we wish to advise the Court that the exchange agent would probably deliver the remaining 400,000 shares to its principals unless this Court were specifically to enjoin further deliverance of these securities." (Unprinted record, p. 838.)

There could be no better reason than this to issue the injunction. The entire preferred stock case would otherwise have become moot for, had the injunction not issued, the plan would have been fully consummated.

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[2] When Mr. Justice Harlan partially stayed the temporary injunction none of the S. E. C.'s findings had been made although the same points had been urged upon the District Court and had been raised before the I. C. C.

While the District Court did not pass on the fairness of the Plan and its conformity to statutory and other legal standards, the wisdom of its action in enjoining the issuance and distribution of the preferred stock is supported by the action of the S. E. C.

The District Court was correct in making findings respecting the Investment Company Act.

Appellants contend that the District Court by granting its final judgment herein enjoining transfer of the new stock was enjoining Alleghany from violating the Investment Company Act" (I. C. C., br., p. 73; Alleghany br., p. 96).

The District Court noted: "It is agreed on all hands that, except for the effect of such an order that Alleghany should be 'considered as a carrier', it would be an investment company subject to the provisions of the Investment Company Act" (R. 603, 89). In the face of this admission by appellants, they nevertheless contend that even if the I. C. C. order is void and the Exchange Offer transactions violate the Investment Company Act, as the court found, the court must overlook the violation and allow 48 million dollars of void and defective securities to pass irrevocably into interstate commerce. Appellants, having urged the court to make findings that the Act was not violated (R. 657), can not now be heard to complain because the court rejected their contentions.

There is nothing in the court's opinion or final judgment to indicate that they were based on the violations of the Investment Company Act which the court found to exist (R. 657-658). The findings to that effect were merely "ancillary to setting aside the order of the Commission authorizing" issuance of the new stock, and to its decision voiding the I. C. C. orders. *Pittsburgh* case, *supra*, citing *Chicago Junction* case, *supra*.

The fact that I. C. C. approval by a valid order was a pre-condition of the stock's issuance, and that this condition could not be fulfilled because the I. C. C. lacked jurisdiction were sufficient to support the final injunction herein. Accordingly, there was no necessity for the court to enforce the Investment Act, nor did it do so.

D. The Preferred Stockholders, as parties to the Exchange Offer Contract which produced the new securities, are not "innocent" purchasers. Being on notice as to the necessity of obtaining a valid I. C. C. order approving their securities they are chargeable with knowledge of everything that they would have learned had they made proper inquiry.

To suggest, as do the Gruss appellants (Br., p. 3) that the preferred stock appellants are "innocent preferred stockholders" is to ignore their true position in the case.[3]

All of these appellants are original Old Preferred stockholders who became holders of the new stock by virtue of their voluntary acceptance of the Exchange Offer. All of the new stock is frozen in the hands of the exchange agent or the original stockholders. (See Alleghany's Statement as to Jurisdiction, pp. 28-29). The preferred stockholders including appellants, manifested their acceptance by signing a letter of transmittal which is Exhibit 15 annexed to the application for approval of the Preferred Stock issue (R. 374; Unprinted R. 2187-8). By executing this letter of transmittal each old Preferred Stockholder became contractually integrated into the Exchange Offer. As a party

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[3] Appellants rely on a statement by Judge Dimock referring to "the plight of innocent stockholders who have given up their old preferred stock and have got a frozen asset in return" (R. 641). Judge Dimock added, however,

> "Alleghany, pleading the cause of these innocent people as a reason why plaintiffs should be deprived of what I conceive to be their legal rights, seems to me an invader who drives before his soldiers a protecting barrage of civilians" (R. 641).

It is clear that his remarks were directed at Alleghany, and that he did not pass on nor were there then tendered to the court below or to Mr. Justice Harlan for determination the issue of the preferred stockholders' "innocence" raised here by appellees. Appellants also omit to note that Mr. Justice Harlan stated, "I would hesitate to stay the injunction on the basis of the equities asserted solely on Alleghany's behalf" (R. 648).

he is obviously not a stranger to the transaction or in a status so removed from it as to entitle him to the attributes of innocence which the preferred stockholder appellants now find it convenient to impute to him.

On the contrary, it appears from the Exchange Offer (R. 334) and from the Letter of Transmittal[4] that it was a pre-condition of the issuance of the new securities that the I. C. C. make an appropriate (valid) order approving the securities.

The Exchange Offer was made public on February 10, 1955 (R. 331) a whole month after the Gilbert petition challenging the authority of the I. C. C. to make its jurisdiction-assuming order had been filed, and 6 days after appellee Breswick filed his petition for leave to intervene (R. 269, 317). Until June 6, 1955 any Preferred stockholder depositing his securities under the Exchange Offer had the right to withdraw them (R. 333). During this entire period when the securities were withdrawable as a matter of right, Preferred Stockholders who made inquiry of the Commission as to the status of the Alleghany application for an

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[4] The Letter of Transmittal provides:

"The undersigned, holder of shares of Series A Preferred Stock of Alleghany Corporation, a Maryland corporation, hereby acknowledges receipt from the Corporation of a copy of the Exchange Offer, dated February 9, 1955, relating to the exchange of shares of Series A Preferred Stock for 6% Convertible Preferred Stock of Alleghany Corporation on the basis of ten shares of 6% Convertible Preferred Stock for one share of Series A Preferred Stock.

"*Subject to Interstate Commerce Commission authorization* and the further condition that not less than 100,000 shares of Series A Preferred Stock, or such lesser number as the Corporation shall elect, be surrendered for exchange, all as set forth in the Exchange Offer, the undersigned hereby offers to exchange the number of full shares of Series A Preferred Stock shown below on the basis of ten shares of 6% Convertible Preferred Stock for one share of Series A Preferred Stock, in accordance with the terms and provisions of the Exchange Offer." (Unprinted R. 2187-8.) (Emphasis supplied.)

order approving the securities would have learned that not only was the right of the Commission to give its approval being seriously questioned by the Appellees but that the authority of the Commission to invest Alleghany with carrier status under Section 5(3) of the Interstate Commerce Act and to regulate under Section 20(a) (the securities approval section) was being challenged on numerous grounds. They would have learned, for example, that on April 11, 1955 appellee Breswick & Co. had put before the Commission the decision of Judge Walsh in *Breswick* v. *Briggs,* (D. C. N. Y., 1955) 130 F. Supp. 953 (R. 490) and that the appellees were seeking to enjoin the issuance of these very securities.[5]

Thus the Preferred Stockholders became subject to the familiar rule that even if they did not have actual knowledge of the infirmities in the Commission's jurisdiction and of the assaults which were being made upon it they were put upon notice of these facts by the surrounding circumstances and would have obtained knowledge thereof if they had made due inquiry. This rule imputes knowledge when opportunity and interest, coupled with reasonable care, would necessarily impart it. When a person has knowledge of facts which would lead an ordinarily prudent man to make further investigation, the duty to make the inquiry arises and the person is charged with such knowledge of the facts

[5] There were 1,186 holders of the old preferred stock, as of January 31, 1955 (R. 356). These were not ordinary, unsophisticated investors but in the testimony of Lenz (Alleghany's expert and a partner in the nation's largest stock brokerage firm, Merrill Lynch, Pierce, Fenner & Beane), "the hard core of preferred stockholders who (in preceding years) had rejected the previous exchange offers" of Alleghany. (*In the Matter of Alleghany Corporation,* S. E. C. File No. 812-987, Proposed Findings of Division of Corporate Regulation, pp. 34-35.) The press carried numerous stories relating to the S. E. C.'s challenge to the I. C. C. jurisdiction asserted by Alleghany. See *New York Times,* Sept. 22, 1954, p. 43; Sept. 25, 1954, p. 22; October 15, 1954, p. 33; April 5, 1955, p. 44.

as inquiry would have disclosed. *United States* v. *Shelby Iron Co.* (1927), 273 U. S. 571, 580; *Nettles* v. *Childs* (C. A. 4, 1939), 100 Fed. 2d 952.

Thus the Preferred stockholders are contracting parties bound in every respect by the terms and the conditions of the Exchange Offer contract including the one which made the obtaining of a valid I. C. C. order a pre-condition to their right to obtain the new securities. They should not now be heard to complain that, lacking the prudence of a reasonable man and insensitive to the obligations imposed upon them by reason of the notice which they had, they discovered only after this action was instituted that the I. C. C. order which they needed to make their securities valid was not obtainable.

Section 47 of the Investment Company Act (15 U. S. C. §80a-46) made the exchange offer contract invalid as to Alleghany because Alleghany, with actual notice, violated Section 7(a) of that Act (15 U. S. C. §80a-7). It also became invalid as to the preferred stockholders because of the duty they were under to make the investigation which would have disclosed both the I. C. C. jurisdictional infirmity and the unregistered investment company status of Alleghany.

Alleghany Distributed the Preferred Stock Pursuant to an I. C. C. Order which Did Not "Take Effect" Due to the Operation of Section 15(2).

Division 4 authorized the issuance of the new stock by its order dated May 26, 1955, but ordered that "this order shall be effective 10 days from and after its date". (R. 536-537). On June 2, 1955, appellees filed with the full I. C. C. their petition for reconsideration. Under §17(8) the filing of this petition "stayed or postponed" Division 4's order, since the order had "not yet become effective,"

On June 22, 1955 the full I. C. C. by its own order affirmed Division 4's order, and ordered "that the said order of May 26, 1955, by Division 4, shall be effective as of the date hereof", that is June 22, 1955 (R. 554). Both orders therefore violated §15(2) which provides that "all orders of the Commission" (except in matters not relevant here) "shall take effect within such reasonable time, *not less than thirty days* • • • according as shall be prescribed in the order" (Gruss brief, *Appendix, p. ii*).[7]

Neither Division 4's order nor the full I. C. C.'s order was therefore in "effect" on June 23, 1955 when Alleghany started to distribute the securities, since 30 days had not expired from the time of entry of either order. On June 23, 1955 the restraining order issued (R. 56), was never vacated thereafter, and eventually was transformed into the final injunction.

Accordingly, the new stock had not even been authorized by the I. C. C. as a matter of law when it was distributed by Alleghany. The preferred stockholders have in their hands merely unauthorized stock certificates or window-receipts therefor.

E. The new Preferred Stock is void under Maryland Law and also under Sections 7(a), 18(d), and 47(b) of the Investment Company Act.

Alleghany asserts (p. 99) that the *Frost* (312 U. S. 38) and *Deckert* (311 U. S. 38) cases are authority for the

[7] Congress obviously intended by this provision to prevent the very stratagem attempted here by giving the defeated parties before the I. C. C. an ample opportunity to apply to a statutory court for a restraining order so that they would not be presented with a *fait accompli* until after the court had examined at least preliminarily into the merits of the controversy. The I. C. C. ignored appellees' request for this opportunity although they specifically requested it (R. 543).

proposition that "Noncompliance with a federal law, such as Section 7 of the Investment Company Act, would not destroy validity of shares in the hands of innocent holders or warrant an injunction against transfer or distribution of the shares."

Frost and *Deckert* both arose under the Securities Act of 1933. In *Frost,* this Court noted:

> "No provision of the Act declares that in the absence of registration, contracts in contemplation of or having relation to a public offering shall be void." (p. 41)
>
> "• • • we are asked to apply a sanction beyond that specified by declaring it null and void because of relationship to a public offering." (pp. 42, 43)

This Court agreed with the S. E. C. that the unregistered securities should not be voided. The S. E. C. pointed out that: "The clear legislative purpose was protection of innocent purchasers of securities • • • (and) this purpose may be thwarted and the investing public injured" if a contrary result were reached (p. 43).

Here the S. E. C. decision concurs in result with the District Court. Its own decision prohibits the securities in order to effectuate, not frustrate, the purposes of the Act, and stops passage into the stream of commerce of "potentially deceptive" securities whose issuance is not "appropriate in the public interest".

Unlike the Securities Act, the Investment Company Act contains a specific statutory requirement and sanction in Section 47 which in terms makes the Exchange Offer transaction void as to Alleghany because the old preferred stock was purchased, redeemed, retired or otherwise acquired by it in violation of Section 7(a)(2); the new stock was sold and delivered in violation of Sec-

tion 7(a)(1),[8] and, as the S. E. C. found, the conversion rights attaching thereto violate Section 18(d) of the Act. Section 47(b) declares: "Every contract made in violation of any provision of this title * * * and every contract * * * hereafter made, the performance of which involves the violation of any provision * * * shall be void (1) as regards the rights of any person who in violation of any such provision * * * shall have made or engaged in the performance of any such contract".

As a result of the prohibitions of the above sections Alleghany's acquisition and cancellation of the old stock is void, and in substance and effect the old stock is still outstanding and uncanceled with all rights appertaining thereto vested in the hands of the persons who originally deposited these shares under the Exchange Offer. As an additional result of the operation of the above prohibitions Alleghany has no power to pay dividends on the new stock or to recognize its conversion rights or any others attaching thereto. In short, performance of Alleghany's contract with respect to the new stock was and is *malum prohibitum*. Its holders thus have in their hands void paper with no enforceable rights thereunder.

> "The question is really one of fact. The law is perfectly clear. Stock which a corporation has no power to issue is void. Such stock confers upon its holder no rights and subjects him to no burdens. Nothing that he or the corporation can do will give it validity." *In Re R. Rombach & Co.* (CA 3, 1926) 9 F 2d 359, 360.
>
> "But here, the Corporation being absolutely without power to increase its stock above a certain limit, no acquiescence of the shareholder can give it validity or bind him or the Corporation. 'A dis-

[8] Section 2(33) defines "sale" as including "every contract of sale or disposition of, attempt or offer to dispose of * * * a security"

tinction must be made between shares which the Company had no power to issue and shares which the Company had power to issue, although not in the manner in which, or upon the terms upon which they have been issued. The holders of shares which the Company has no power to issue, in truth had nothing at all and are not contributors.' 2 Lindley, Part., 138; and see *Lathrop* v. *Kneeland*, 46 Barb., 432; *Mackley's Case*, L. R., 1 Ch. D., 247."

Scovill v. *Thayer* (1881), 105 U. S. 143, 149-150.

Under Section 7(a) of the Act Alleghany had no power to issue *any* new stock while an unregistered investment company, and under Section 18(d) as a registered company it expressly has no power to issue the 6% Convertible Preferred Stock.

Maryland law follows *Scovill*. *Dingle* v. *Shaab*, 179 Md. 589, 597.[9] There, where a condition of the issuance of new stock had not been met the court declared the stock void. Here, the condition that the stock be approved by an appropriate (valid) I. C. C. order (R. 334, 374) has also not been met. Inasmuch as stock may be void merely because a company is without power to issue it in violation of its charter or applicable state law, it obviously is void if the Congress in the exercise of its power to regulate interstate commerce, has taken away from the Company the power to issue it.

F. Any hardship devolving upon the preferred stockholders is self-inflicted.

Both the District Court and appellees on several occasions offered to relax the temporary restraining order, the preliminary injunction and even the final judgment so that,

[9] Alleghany is a Maryland corporation (R. 418).

pending final determination of this case, the preferred stockholders might receive back their old securities and would no longer be frozen or remain under any hardship (R. 89, 91, 92). All of these offers were rejected by appellants (R. 89, 91), including the preferred stockholder appellants now before this court, who preferred to gamble on an all or nothing result in the hope that their self-inflicted hardship might persuade this court to relieve them of the "inequitable" consequences thereof, and permit them to profit by receiving securities with a $15,000,000 current market premium *over* 100% of their claim, pursuant to a plan now held statutorily improper and "grossly unfair" by the S. E. C.[10]

G. Appellants inequitably ignore the rights of the 16,499 common stockholders, and the intervening equities acquired at a cost of 13 to 23 million dollars arising since Alleghany's registration with the S. E. C. on December 9, 1955.

Appellees sued in their own right individually and on behalf of all common stockholders as a class (R. 557-558).

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[10] Judges Hincks, Walsh and Dimock each suggested from the bench on June 28, 1955, that the parties work out a return to the *status quo ante* so there would be no hardship to any person pending a final adjudication (R. 85-86, 89, 91). Alleghany's counsel (Mr. Hartfield, Jr.) refused, stating:

> "The stock is validly issued, outstanding, unrecallable stock, no matter what happens in your order there. That doesn't concern us" (R. 91).

Counsel for Gruss & Co. (Mr. Levin) stated on behalf of the preferred stockholders:

> "• • • I can't conceive of anything that would work this out with the structure we are left with" (R. 86).

Thus appellants have inflicted on the preferred stockholders for no less than 18 months a "freeze" which the court and counsel for appellees (Mr. Brussel, R. 92) offered to relax provided appellants only relinquished the unfair advantage they sought by disrupting the *status quo*. All the "equities" they assert derive solely from this one inequitable act.

There are 16,499 common stockholders, and 1,312 old preferred stockholders (R. 220). It is conceded that the decision herein will affect all stockholders of both classes, and not merely the rights of the individual parties.

Alleghany has represented to this Court and appellees agree that all the new preferred stock has been "frozen" since June 24, 1955 in the hands of the exchange agent or original preferred stockholders.[11] (Statement as to Jurisdiction, pp. 28-29, Alleghany brief, p. 8.)

The Gruss & Co. preferred stockholders note in their brief (p. 10) that the new shares "are still not cleared for trading by either the New York Stock Exchange or the National Association of Security Dealers." There has been no settlement of sales of the new stock traded on the exchange on June 24, 1955 or prior thereto on a "when-issued" basis (R. 77). All such sales are cancelled without loss other than payment of commissions, if the new stock remains premanently enjoined. Thus the *status quo* has been preserved with respect to the new stock. But this is not true with respect to the common stock.

Alleghany registered with the S. E. C. on December 9, 1955. There are 4,637,797 shares of common stock outstanding (R. 578). During the year 1956, a total of 2,298,700 shares of common, or 50% of the total, sold on the New York Stock Exchange at market prices ranging from $6⅝ to

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[11] Since the first restraining order issued at 5:55 P. M. on June 23, 1955, no new stock has been transferred out of the hands of the original holders insofar as disclosed by the record. It has, however, been implied, without proof, that there have been some "hand-to-hand transactions" (Alleghany brief, p. 100). Assertions to this effect in the Baker, Weeks & Co. answer to the complaint were not litigated. None of such transferees, if they exist, is before the Court. Presumably they all had at least some notice of the court's order, and hold their securities subject to the same rights and obligations of the original holders. In any event this question can be properly determined when the District Court molds its decree to restore the *status quo ante*, assuming its judgment here is affirmed.

$10⅜ a share, or a total of 13 to 23 million dollars (*New York Times*, Jan. 2, 1957, p. 98). None of these stockholders voted in favor of the plan. All bought their shares after final judgment had been granted on December 23, 1955. Thus there now exist intervening equities on behalf of genuinely innocent investors, based on the protections of the Investment Company Act, which appellants would inequitably destroy.

Nor have the preferred stock appellants in any way overcome the finding of the S. E. C. that the plan is "grossly unfair" to the common stockholders. Appellants Gruss, in fact, provide no justification for releasing into the stream of commerce some 48 million dollars in "potentially deceptive" stock, other than their personal desire to "cash in" on their securities by being allowed to complete their sales to innocent third parties (R. 77).

None of the appellants explains why it is fair to exchange conversion rights valued in the market at 48 million dollars in June, 1955, for claims with a maximum value of 33 million dollars. Yet to unload the new stock unrecallably on the market so that the common stockholders may never be able to recover this 15 million dollar excess would be an inequity of the grossest kind.

To these equitable considerations on behalf of the common stock, which are buttressed by their undeniable legal rights as decided by the court below, appellants urge most frequently and in unison that these should be overlooked because "the value of the old preferred stock on May 1, even before the exchange was approved by the I. C. C., was in the neighborhood of $40,000,000, which is many times that of the plaintiffs' shares, presently valued at about $7,000" (Gruss br., p. 32).

Aside from the unfairness of comparing the market value of all the 1,312 preferred stockholders' claims, as a class,

with the market value of stock owned by only 2 small common stockholders instead of the $46,000,000 in common stock market value owned by all 16,499 common stockholders as a class, this argument would suggest that equity is balanced in the Supreme Court of the United States according to the wealth of the contending parties. This Court has specifically repudiated as irrelevant the fact that objectors to a corporation's proposal own only a small amount of stock. *Case* v. *Los Angeles Lumber Co.* (1939), 308 U. S. 106, 115.

Furthermore, the record here shows that appellants represent large stockholders, and in taking their gamble on all or nothing of the present plan when they rejected appellees and the District Court's offers to relax the injunctions, they did not first consult with or give any consideration to the wishes of their fellow stockholders. Instead they rejected the offers immediately after they were made (R. 89, 91, 92). In view of this reckless and irresponsible behaviour in the court below, it ill becomes appellants now to urge equitable considerations as a ground for reversal of that court.

H. Affirmance of the District Court judgment will open the door to the most expeditious relief by making possible prompt return to the status quo ante.

Appellees have at all times stated, and here and now reiterate that when, as and if the judgment below becomes final, they will move promptly in the District Court for an order restoring the *status quo ante* and returning to the preferred stockholders their old securities. In fact, the District Court has expressly reserved this right to appellees (R. 674). That such a power rests in the court is amply demonstrated by *Porter* v. *Warner* (1946), 328 U. S. 395, at 398:

"And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. *Virginian R. Co.* v. *System Federation,* R. E. D. 300 U. S. 515, 552, 81 L. Ed. 789, 802, 57 S. Ct. 592. Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and to mould each decree to the necessities of the particular case.' *Hecht Co.* v. *Bowles,* 321 U. S. 321, 329, 88 L. ed. 754, 760, 64 S. Ct. 587. It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice."

And in the same case at page 398:

"Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief. To be sure, such a recovery could not be obtained through an independent suit in equity if an adequate legal remedy were available.[2]

"[2] But if a defendant with notice of a pending injunction proceeding completes the acts sought to be enjoined, the court of equity may restore the *status quo* by means of a mandatory injunction. *Texas & N. O. R. Co.* v. *Northside R. Co.,* 276 US 475, 72 L. ed. 661, 48 S. Ct. 361; *Porter* v. *Lee,* 328 U. S. 246, *ante,* 1199, 66 S. Ct. 983."

If, on the other hand, this court upholds the jurisdiction-assuming order, the District Court will have to consider the preferred stockholder plan, approved by the I. C. C.'s Section 20a order, on the merits. It will thus either concur or disagree with the S. E. C.'s findings that the plan is "grossly unfair" to the common stock and "potentially deceptive" to investors and offends against "the public interest." Whether it will first remand the plan to the I. C. C. for an evidentiary hearing or review it on the present record will also have to be determined. Any final order it makes will of course be subject to appeal to this court.

I. The injunction should not be vacated, since to do so may destroy the existing judicial machinery for a prompt restoration of the status quo ante.

In its brief the United States suggests that there is no necessity for the injunction below because of the intervening assumption of jurisdiction by the S. E. C. and its denial of an exemption from the Investment Company Act of the preferred stock issue. We agree with the Government's conclusion that consummation of the preferred stock exchange plan by Alleghany would, if the injunction were vacated, constitute a "willful" violation of the Investment Company Act.

However, we believe that the injunction should be maintained in full force and effect so that the equity power of the District Court may remain unimpaired to deal with the problem of restoring the *status quo ante*. If this court affirm and vacate the injunction, the District Court may interpret the vacatur as a direction to remit the preferred stockholders to such remedies as they may have elsewhere, a result which we consider unnecessary and unfortunate in the interests of regularizing the corpo-

rate status of Alleghany as soon as possible so that the annual meeting may be held and voting and other stockholder rights may be quickly restored.[12]

The S. E. C., appellees, or other parties in interest would have to commence new litigation, which necessarily would be onerous, delaying and time-consuming and which might present serious questions with respect to whether the powers of the court whose jurisdiction was being newly invoked were as broad and effective as those of the court below to repair a disruption of the *status quo*. In this *sui generis* case (which is novel only because the *status quo* was disrupted) it is desirable for the protection of the equities of all of the parties to preserve intact the ancillary equity jurisdiction of the court below, as implemented by the decisions of this court in *Porter* v. *Warner, supra* and the cases there cited.

Even the S. E. C. may be powerless to compel third parties to present their stock for rescission, whereas the court below under the cited cases unquestionably has such power. Under Sections 42 and 44 of the Investment Company Act, upon which the Government relies, the powers of the S. E. C. are not so defined as to apply to suits for restoration of the *status quo ante* resulting from old violations established in a civil action to which the S. E. C. was not a party. Short of instituting proceedings *de novo* before itself or in the District Court under Sections 42 and 44 the S. E. C. has no power as an administrative agency to bring before it the third parties in whose hands now repose that part of the new stock issue which has been

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[12] No annual meeting has been held since May, 1954. In a related case the District Court held that, until the questions at issue herein had been resolved, Alleghany would be unable to hold its annual meeting *Rosen* v. *Alleghany Corp.*, (D. C. N. Y., 1955) 133 F. Supp. 858, 865.

distributed. The S. E. C. alone may lack the power to revivify the old Series A Preferred Stock cremated by the precipitate action of Alleghany. While we do not doubt that a new proceeding might be brought in which all these rights and issues could be litigated, it would seem to be desirable to avoid the serious jurisdictional and venue problems which such a new proceeding might raise. The equity powers of the statutory court in this case are plenary and adequate; we urge that its juridiction be preserved.

If the injunction be affirmed, appellees will immediately move for an appropriate order by the statutory court compelling Alleghany to notify all of the original holders of the deposited preferred stock that the window receipts for the new stock and the new stock itself are void, and that upon presentation to the corporation of these receipts or new stock, a new stock certificate will be issued with all the rights that pertain to the cancelled Series A 5½% Stock, said certificate to be identical in all respects to the surrendered ones. Thereafter any remaining problems may be resolved by the one court which has appropriate jurisdiction and the existing machinery to deal with them promptly.

We disagree with the United States that there is a "difficult question" of the injunction's "initial validity." (Br., p. 40). Can it be seriously argued that a statutory court is powerless to maintain the *status quo ante* when a reckless and defiant party to the proceedings refuses to abide the orderly determination of questions committed to the court by statute and threatens by its conduct to deprive it of effective jurisdiction? If so, the powers of statutory courts under the Urgent Deficiencies Act will be emasculated.

Conclusion.

The judgment of the District Court should be in all respects affirmed.

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Appellee, *Pro Se.*

Dated: January 15, 1957.

APPENDIX A.

Chronological Statement of Administrative and Judicial Proceedings.

Date		Printed Record Page No.
1929		
Jan. 26	Organization of Alleghany, which "since its creation * * * has been in the investment business, dealing in corporate securities including those of railroads" (I. C. C. Report, March 2, 1955)	418
1940		
Nov. 1	Alleghany registers with S. E. C. under Investment Company Act of 1940	193
1945		
June 5	I. C. C. assumes jurisdiction over Alleghany as result of approving its acquisition of control of Chesapeake & Ohio Railroad System	418
Oct. 4	S. E. C. terminates Alleghany's Registration, pursuant to Section 3(c)(9) of the Investment Company Act	194
1954		
Jan. 19	Alleghany divests itself of all control over Chesapeake & Ohio Railroad System	513
Jan. 28	Alleghany informs I. C. C. it is no longer acting under June 5, 1945 order	274-275
Apr. 8	Young, Kirby, Murchison and Richardson, as owners of 1,000,000 shares of New York Central Railroad Co.'s capital stock, commence solicitation of proxies in New York Central proxy contest for election of themselves and 11 other associates as directors of New York Central	409-410

Date		Printed Record Page No.
1954		
May 26	Annual Meeting of New York Central stockholders (Young, Kirby, Murchison, Richardson and 11 associates elected directors)	417
June 22	I. C. C. orders Alleghany to show cause why June 5, 1945 order should not be vacated (FD* #14692)	423
June 29	Alleghany requests postponement of I. C. C. determination of FD #14692	423
July 7	S. E. C. initiates proceeding to determine whether its 1945 order should not be revoked. These proceedings are also postponed at Alleghany's request	193
July 14	Alleghany responds in FD #14692 claiming its relationship to New York Central Railroad Co. to be similar to its former relationship to Chesapeake & Ohio and asks postponement of hearing until filing of new application of Alleghany, Central, Big Four and Jeffersonville to merge Jeffersonville into the Big Four	423
July 15	Up to this date Alleghany owns only 11,400 shares of New York Central stock	394
July 15	Alleghany purchases 300,000 shares of New York Central stock	197
July 23	I. C. C. orders action withheld for 60 days to permit filing of new application	423
Sept. 14	S. E. C. files memorandum with I. C. C. in aid of S. E. C.'s petition asking I. C. C. to decline jurisdiction over Alleghany. Discloses Young and his associates personal use of $8,578,000 of Alleghany's funds. FD #14692	191

* Reference is to I. C. C. Finance Docket.

Date		Printed Record Page No.
1954		
Sept. 20	Alleghany status application filed with I. C. C. FD #18656	210
Dec. 6	Alleghany files supplemental application with I. C. C. FD #18656	248-250
Dec. 20	S. E. C. files supplemental memorandum with I. C. C. FD #14692 and 18656	251-260
Dec. 28	Prior to this date Young doubles his Alleghany preferred stock holdings (135 F. Supp. 397, 402, 403)	
Dec. 28	Alleghany Board approves preferred stock Exhange Offer	520
1955		
Jan. 11	Filing of Gilbert petition to intervene in opposition to I. C. C. jurisdiction in FD #18656 and for oral argument	269-281
Jan. 14	Alleghany calls special meeting of its stockholders on February 8, 1955 to authorize new convertible preferred stock and issuance of up to 10,000,000 common shares to accommodate proposed conversion rights	284-286
Jan. 14	Alleghany mails proxy statement to its stockholders. No disclosure made of possible $15,000,000 premium to preferred stockholders as result of plan	286-311
Feb. 4	Breswick & Co. petitions I. C. C. to intervene in opposition to I. C. C. jurisdiction in FD #14692 and 18656 and requests an evidentiary hearing	317-324
Feb. 8	Alleghany holds special meeting of common and preferred stockholders. Stock plan authorized	337

Date			Printed Record Page No.
1954			
Feb.	9	Division 4 denies Gilbert petition *in toto*.	324-326
Feb.	10	Alleghany transmits the Exchange Offer to its preferred stockholders.	331-367, 640
	15	Division 4 of the I. C. C. denies Breswick petition to intervene *in toto*.	368-370
	18	Alleghany files application for permission to issue new preferred stock. FD #18866	371-392
	21	Breswick files amended petition for leave to intervene in FD #14692, 18656 and again asks for an evidentiary hearing.	392-410
Mar.	2	Division 4 dismisses Breswick amended petition for leave to intervene.	412-414
	2	Report and order of I. C. C. in FD #14692 and 18656	414-448
		(1) approving "merger" of Jeffersonville into Big Four and lease "modification";	
		(2) directing that Alleghany be "considered as a carrier"; and	
		(3) terminating order of June 5, 1945 FD #14692.	
	4	Alleghany applies for indirect control of lessor, Boston & Albany, FD #18789, without notice to its stockholders.	565-599
	21	Gilbert-Breswick petition for reconsideration filed with full I. C. C. FD #14692, #18656	448-449
	22	Report and Order of Division 4 approves application by Alleghany to acquire indirect control of Boston & Albany without notice to stockholders and without opportunity for hearing.	450-473

Date		Printed Record Page No.
1955		
Mar. 28	Gilbert and Phillips petition I. C. C. to intervene in preferred stock proceeding (FD #18866) and for rehearing and reconsideration in status docket FD #14692, 18656, and ask for evidentiary hearing	478-480
Apr. 1	S. E. C. petitions I. C. C. for reconsideration, FD #18656, 14692	485-489
6	Judge Walsh denies appellees' motion to enjoin Alleghany from further proceeding before I. C. C. in status and preferred stock dockets, remitting appellees to their administrative remedy before the I. C. C. (135 F. Supp. 953)	490
11	Appellees file amended petition for leave to intervene in FD #14692, 18656 and 18866, and amended petition for reconsideration of FD #14692 and 18656, and asks for evidentiary hearing, based on Judge Walsh's decision	489-492
20	I. C. C. order admitting appellees to intervene as interested parties	519
	(This order was withheld from appellees until May 27, 1955, *after* the I. C. C. had ruled on the merits and had denied appellees' requests for an evidentiary hearing)	540
May 24	Full I. C. C. files report and order FD #14692, 18656	506-517
	(1) grants S. E. C. petition for reconsideration;	
	(2) grants Gilbert - Breswick - Phillips petition for lease to intervene "as of the date hereof" and their request for reconsideration;	

Date		Printed Record Page No.
1955		
	(3) denies Gilbert - Breswick - Phillips request for hearing;	
	(4) makes its own findings; and	
	(5) approves Division 4 order of March 2, 1955.	
May 26	Division 4 files report and order approving issuance of new preferred and common stock (FD #18866)	518-537
27	Appellees receive Division 4 report and order of May 26, 1955 and for the first time are notified of April 20, 1955 order admitting them to intervention	540
June 2	Gilbert, Breswick and Phillips file petition for reconsideration of order approving issue of preferred stock, for leave to intervene and demanding evidentiary hearing (FD #18866), and renew challenge to jurisdiction (FD #18656)	537-543
6	Appellees file complaint in 3-judge court action to void March 2 and May 24, 1955 orders	32
15	Appellees move for preliminary injunction returnable June 23, 1955	53
21	Allegheny moves for leave to intervene to oppose motion for "temporary restraining order" (obviously meaning "preliminary injunction")	54-55
21	Stipulation for adjournment of motion for preliminary injunction to June 30, 1955 at request of appellant I. C. C. and defendant United States	95, 96, 121, 135

Date		Printed Record Page No.
1955		
June 23	I. C. C. issues order dated June 22, 1955 affirming order of Division 4 of May 24 and denying reconsideration	554
23	I. C. C. order in possession of Alleghany counsel at 12 noon	641
	Counsel notifies appellees' counsel of issuance of preferred stock (4:30 P. M.)	57
	Judge Dimock signs temporary restraining order (5:55 P. M.)	56
24	Alleghany motion to vacate temporary restraining order denied	(Unprinted R. 923, *et. seq.*)
24	New preferred stock suspended from trading on New York Exchange	115
28	Motion by preferred stockholders for vacatur of temporary restraining order denied	91
July 21	Opinion of 3-judge court granting application for interlocutory injunction	601-628
26	Order granting preliminary injunction	103-108
26	Opinion of Judge Dimock denying stay	639-641
Aug. 1	Hearing before Mr. Justice Harlan on Alleghany application for supersedeas	110
3	Opinion of Mr. Justice Harlan partially granting stay of injunction as to 876,000 out of 1,344,000 new preferred shares	643-650
9	Order of Mr. Justice Harlan partially granting stay	110-112
Sept. 13–14	Final hearing before 3-judge court	147-148 (Unprinted R. 923, *et. seq.*)

Date			Printed Record Page No.
1955			
Nov.	18	Opinion of 3-judge court granting final injunction	651-673
	23	Supplemental opinion of 3-judge court making temporary injunction permanent	674-675
Dec.	23	Final judgment of 3-judge court annulling orders of I. C. C. and enjoining enforcement thereof	555-557
1956			
Jan.	27	3-judge court denies Alleghany motion for a new trial	675
Dec.	7	3-judge court files *per curiam* opinion denying that it was its intention to void that part of I. C. C. order of March 2, 1955 terminating 1945 I. C. C. order investing Alleghany with carrier status by reason of its then control of C. & O.	(Appellees' br., App. C)

APPENDIX B.

Summary Analysis of Stockholder Rights under the Investment Company Act of 1940, 15 USC §80a-1, *et seq.*, 54 Stat. 789*

These rights include:

The prohibitions of Section 7(a), 15 USC §80a-7(a), which prevent the management of a non-registered investment company from causing it, among other things, to "engage in any business in interstate commerce;" [§7(a)(4), 15 USC §80a-7(a)(4)] or to "control any company which is engaged in any business in interstate commerce." [§7(a)(5), 15 USC §80a-7(a)(5)];

The right to compel the management to make the disclosures required by registration of investment companies as set forth in Section 8, 15 USC §80a-8;

The right to ban certain affiliated persons and underwriters of a company from acting in specified capacities as set forth in Section 9, 15 USC §80a-9;

The right to have a board of directors free of a specified type of affiliation as set forth in Section 10, 15 USC §80a-10;

The right to limit the functions and activities of the investment company as set forth in Section 12, 15 USC §80a-12;

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* Under the Public Utilities Holding Company Act of 1935 (49 Stat. 838, 15 USC 79, *et seq.*) a statute in *pari materia* with the Investment Company Act, a private person may litigate to enforce the statute. *Goldstein* v. *Grosebeck* (CA 2) 142 F. 2d 422, 427, citing *Texas & Pacific R. Co.* v. *Rigsby* (1916) 241 U. S. 33. We know of no similar judicial holding under the Investment Company Act but in *Callister* v. *Graham Paige Corporation* (United States District Court, Del., Civil Action No. 1844), the present general counsel of the S. E. C. informed the court that the matter of a violation of Section 18 of the Investment Company Act was "not one solely for consideration by S. E. C. and may be argued by private parties where appropriate to issues in litigation" (telegram of October 10, 1956 from Thomas G. Meeker, Esq., to Hon. S. Richard Rodney, D. J., filed as part of the record in that case).

The right to prohibit changes in investment policy except as set forth in Section 13, 15 USC §80a-13;

The right to limit investment advisory and underwriting contracts except as set forth in Section 15, 15 USC §80a-15;

The right to limit the changes in the board of directors except as set forth in Section 16, 15 USC §80a-16;

The prohibition of transactions between certain affiliated persons and underwriters as set forth in Section 17, 15 USC §80a-17;

The right to have the kind of capital structure set forth in Section 18, 15 USC §80a-18;

The right to be protected against unlawful payment of dividends as set forth in Section 19, 15 USC §80a-19;

The right to prohibit solicitation of proxies, except as set forth in Section 20, 15 USC §80a-20;

The prohibition against any loan of the company's money or property to any controlling person as set forth in Section 21, 15 USC §80a-21;

The right to have the SEC, upon the request of holders of 25% of any class of stock, issue an advisory report in respect to the fairness of any plan of reorganization and its effect upon any class of stock as set forth in Section 25, 15 USC §80a-25;

The right to the information required to be disclosed in periodic and other reports as set forth in Section 30, 15 USC §80a-29;

The right to have the company's accounts and records kept in the manner specified in Section 31, 15 USC §80a-30; and the related rights of Sections 32, 34 and 35, 15 USC §§80a-31, 80a-33, 80a-34;

The right to enjoy the protection by means of injunctions set forth in Section 36, 15 USC §80a-35;

Prohibitions against larceny and embezzlement as set forth in Section 37, 15 USC §80a-36;

Various procedural rights set forth in Sections 38, 39, 40, 41, 42, etc., 15 USC §§80a-37, 80a-38, 80a-39, 80a-40, 80a-41, etc.; and

The rights respecting validity of contracts set forth in Section 47, 15 USC §80a-46, including the right to have declared void any condition, stipulation, or provision binding any person to waive compliance with any provision of the Act, and to have declared void every contract (such as the Exchange Offer herein) made in violation of any provision of the Act.

APPENDIX C.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BRESWICK & Co., *et al.*,
Plaintiffs,
against
UNITED STATES OF AMERICA, *et al.*,
Defendants.

Copy #23078
U. S. District Court
Filed
Dec. 7 1956
S. D. of N. Y.
Civil No. 101-114

Per curiam:

Plaintiffs move for amendement of our judgment in this cause.

In our opinion reported in 138 F. Supp. 123, after having stated our primary reason for holding that Alleghany no longer had the status of a carrier by virtue of the I. C. C. order of June 5, 1945, we went on to say (p. 129):

> "But, even if we are wrong in this respect, there remains the fact that the I. C. C., in its 'status' order, issued by Division Four on March 2, 1955, and affirmed by the full Commission on May 24, 1955, expressly terminated the June 5, 1945 order so that when, on June 22, 1955, the I. C. C. purported to authorize the issuance of the preferred stock, the June 5, 1945 order had already been explicitly nullified."

Plaintiffs have called our attention to the fact that a portion of our judgment entered subsequent to the rendition of our opinion may be or appear to be inconsistent with the language just above quoted. For purposes of clarification we now state that, if there is any such incon-

sistency, it was inadvertent, and we stand by the above quoted language of the opinion.

With the foregoing explanation we deny without prejudice the motion for amendment of the judgment.

JEROME N. FRANK,
U. S. C. J.

E. J. DIMOCK,
LAWRENCE E. WALSH,
U. S. D. JJ.

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 38.

ALLEGHANY CORPORATION, *et al.*,
Appellants,

v.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,
Appellees.

No. 114.

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

BRESWICK & CO., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPLICATION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF, AND SUPPLEMENTAL BRIEF.

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RANDOLPH PHILLIPS,
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Appellee, *Pro Se.*

Dated: January 28, 1957.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 36.

ALLEGHANY CORPORATION, *et al.*,

Appellants,

v.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

No. 114.

INTERSTATE COMMERCE COMMISSION,

Appellant,

v.

BRESWICK & CO., *et al.*,

Appellees.

APPLICATION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Appellees herein respectfully apply for leave to file the Supplemental Brief appended hereto for the following reasons:

Revised Rule 41(5) of this Court provides that "Whenever a party desires to present * * * intervening matters that were not available in time to have been included in his brief in chief" he may do so after hearing "by leave of court."

In the closing rebuttal statement of counsel for Alleghany Corporation (Mr. Seymour) at the oral argument herein on January 24, 1957, and in answer to a question by Mr. Justice Brennan concerning the Boston & Albany transactions (R. 676-7), counsel stated that Mr. Ginnane, counsel for the I. C. C., had provided him with two case citations (261 I. C. C. 623 and 257 I. C. C. 796) which he thereupon gave to the court.

Neither of these cases was cited in any of appellants' briefs, nor were they referred to in any reply briefs or in the argument in chief of appellants. They were mentioned by Alleghany counsel for the first time after appellees' argument had been concluded and after their time to argue had expired. Thus appellees have had no opportunity to present this Court with their views in respect thereto. Because in appellees' view these cases conclusively resolve the issue set forth in Point IV of their brief in favor of the appellees this opportunity is of importance to them.

We believe it is the spirit and intent of Rule 41(5), when read in conjunction with that part of Rule 44 requiring appellants "to make a fair opening" and entitling them "to open and conclude the argument", that an appellee should not thus be foreclosed from commenting on the authorities advanced in support of an appellant's case.

For these reasons appellees respectfully ask leave to file the supplemental brief appended hereto.

January 28, 1957

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